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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

THE UNIVERSITY OF TEXAS, ET AL.
Petitioners

V.

WALTER CAMENISCH
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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Petitioners, University of Texas, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 28, 1980, with Petitioners' timely Motion for Rehearing being denied on May 29, 1980.

QUESTIONS PRESENTED FOR REVIEW

The principle questions presented for review are:

1. Whether the Court of Appeals misconstrued this Court's decision in *Southeastern Community College v. Davis*, _____ U.S. _____, 99 S.C. 2361 (1979) so as to require that the University of Texas provide auxiliary services and affirmative action under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and assume the financial and administrative burdens of furnishing an interpreter for a deaf graduate student to assist him in his classroom work.

2. Whether the Court of Appeals correctly held that Section 504 of the Rehabilitation Act of 1973 confers a private cause of action in favor of handicapped persons.

3. Whether, assuming arguendo that Section 504 requires auxiliary services and affirmative action which impose a financial burden on a defendant institution and further that Section 504 confers a private cause of action in favor of the handicapped, the handicapped plaintiff must show that the financial assistance received by the institution was intended to support the particular "program" in which the handicapped plaintiff is enrolled or engaged.

PARTIES TO THE PROCEEDING

In the District Court below, Walter Camenisch, as Plaintiff, brought suit against:

The University of Texas;

Charles A. LeMaistre, individually and in his official capacity as Chancellor of the University of Texas;

Allan Shivers, individually and in his official capacity as Chairman of the Board of Regents of the University of Texas;

Lorene Rogers, individually and in her official capacity as President of the University of Texas, at Austin; and

Robert Brown, individually and in his official capacity as Vice President for Administrative Services of the University of Texas, at Austin.

All of the individuals no longer serve in the capacities described. However, the University of Texas is the real party in interest and no defect as to parties is alleged by Petitioners.

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OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at 616 F.2d 127. A copy of the opinion is also included in the Appendix to this Petition. The District Court opinion is not reported but is included in the Appendix together with the District Court's judgment. The judgment of the Fifth Circuit and its order denying rehearing is also set out in the Appendix (the denial of rehearing is reported at 618 F.2d 1389).

JURISDICTION

The opinion of the Court of Appeals was entered on April 28, 1980. Petitioners' Petition for Rehearing, which was timely filed, was overruled by the Court of Appeals on May 29, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1234(1).

STATUTE INVOLVED

The statute in question in this case is Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; the statute originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(6)(29 U.S.C. §706[6]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for non-discrimination by federal agencies and after amendment now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7)(29 U.S.C. §706[7]), shall solely by

reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

STATEMENT OF THE CASE

Walter Camenisch, a deaf graduate student at the University of Texas at Austin, sued to require the University to provide him with an interpreter to assist him in his classroom work. The District Court found that Section 504 was applicable to Camenish's claim and directed the University to provide this service and the University appealed. The Court of Appeals affirmed the District Court, under the authority of Section 504, and denied Appellants' Motion for Rehearing En Banc.

At the hearing in the District Court, Walter Camenisch testified that the University, during his studies at the institution, accomodated his handicap at all times by allowing the presence of an interpreter in the classroom.

It was stipulated at the trial that the University of Texas was the recipient of federal funds but no showing was made that any of the programs or activities in which Camenisch took part received federal financial

assistance.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erroneously interpreted this Court's decision in *Southeastern Community College v. Davis.*

The Court of Appeals held in its panel decision that Southeastern Community College v. Davis, ____ U.S. ____ , 99 S.Ct. 2361 (1979), did not prohibit the imposition on the University of Texas at Austin of the financial and administrative burdens of furnishing an interpreter for a deaf graduate student to assist him in his classroom work. The Court in construing *Davis* held:

> "The decision in *Southeastern Community College* was clearly not intended to bar relief under this statute for all handicapped people in the future." 616 F.2d 132.

The Court further stated that:

> "In this case, HEW regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters." 616 F.2d 133.

The Court finally held that:

> ". . .the Supreme Court's decision in *Southeastern Community College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training. While such a rule obviously needs more clarification[1], it is

[1]This Court of Appeals' acknowledgment suggests that the certiorari be granted.

> clear that in this case Camenisch's claim can succeed on the merits, despite the holding in *Southeastern Community College*, since he can obviously perform well in his profession." 616 F.2d 133.

These judicial pronouncements are wrong.

While under *Davis* a University might be required to permit a blind student to tape record lectures where the practice is otherwise forbidden or to permit a deaf student to use an interpreter in the classroom (at the student's expense and which was allowed by the University in this case), no *financial* obligation can be imposed on the University by virtue of Section 504 of the Rehabilitation Act of 1973.

This Court in *Davis* held:

> "Here neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." 99 S.Ct. 2369-70.

The University agrees that it must accommodate, in some cases, handicapped students where no financial outlay is required. However, a reading of the entire Rehabilitation Act of 1973 reveals that Section 504 of the Act was not, and is not intended to create financial obligations on the states and state instutitions.

The Act establishes the Federal Rehabilitation Service Administration and provides for a number of programs to assist the handicapped. Among the services offered are evaluation, counseling, training, restoration, placement and maintenance of the handicapped, and architectural and transportation barriers are also addressed. Federal monies are appropriated to carry out these services.

As the final provision of the Act, Congress added Section 504 (29 U.S.C. §794), which provided:

> "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

This is all Congress said on the subject of programs receiving federal financial assistance and the participation of handicapped persons in these programs. Nothing was said concerning the enforcement responsibilities of this legislation or the consequences of any violation of the statute. No monies were appropriated by Congress to fund any affirmative action or reasonable accommodation steps or processes which may be required to permit the handicapped to engage in federally assisted programs which may be inaccessible or unavailable unless some accommodation is made in favor of the handicapped.

On April 28, 1976, Executive Order No. 11914 was issued which dealt with non-discrimination in federally assisted programs. Therein, the President conferred on the Department of Health, Education and Welfare (an action questioned by the University), the power to interpret, administer and enforce the provisions of Section 504. However, the Order did not direct HEW to construct an affirmative action program under the aegis of Section 504.

In late 1978, Section 504 was amended to provide for non-discrimination by federal agencies with the requirement that such agencies indicate compliance by the establishment of regulations to implement the non-discrimination mandate. *No such requirement was imposed by Congress on recipient agencies, other than*

federal, to take any affirmative compliance steps.

At the same time that Section 504 was amended to include federal agencies, new handicapped programs were enacted to remove architectural and transportation barriers, to provide employment opportunities for the handicapped, and to provide for "independent living" by handicapped persons, (Pub L. 95-692, codified as 29 U.S.C. §§794(b), 795 and 796). While federal monies were provided for the new programs, Congress again failed to make federal appropriations to provide for accommodation of the handicapped in federally assisted programs covered by Section 504.

It is patently evident that Section 504 imposes no financial liability upon those covered by the Act, and the Court of Appeals' decision in this case is erroneous.

At the very least, this Court should grant a Writ of Certiorari to provide "clarification" of the *Davis* decision for the benefit of the federal courts.

2. The Court of Appeals held that Section 504 provides a private cause of action to handicapped persons, a question expressly left unresolved by this Court in *Southeastern Community College v. Davis.* A Writ of Certiorari should be granted to decide this important and recurring question for the guidance of the Federal Courts.

The Court of Appeals found that Section 504 creates a private cause of action on the part of handicapped persons. This determination is questionable in view of that Court's recent decisions in *Rogers v. Frito-Lay, Inc. and Moon v. Roadway Express, Inc.*, 611 F.2d 1074 (5th Cir. 1980), construing Section 503 of the Rehabilitation Act of 1973.

In *Rogers*, the Court of Appeals declined to find a

private cause of action pursuant to Section 503, stating that:

> "Federal Courts are not common law courts of general jurisdiction. Limited by the express language of the Constitution, and the functional role it allots to the judiciary, we can recognize the cause of action only if it has been created by statute . . . Therefore, our answer to the question in this case depends, the authorities and the parties all agree, on whether Congress intended, when this statute was enacted, to create such a method of enforcing the statutory policy. Because Congress did not speak to us unequivocally, either in the statute or in some other authoritative fashion, we must seek an answer in the history of enactment of the statute and in analogies to what the courts have derived from other statutes."
>
> "Having done so, in a manner we describe below, we have concluded that Congress has not authorized a private cause of action." 511 F.2d 1078.

See also *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 Fed. 87 (4th Cir. 1978), cert. denied 442 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District*, 471 F.Supp. 119 (D.C. Mo. 1974), affirmed ____ F.2d ____ (8th Cir., May 6, 1980).

The foregoing decisions illustrate the difficulties experienced by the Federal Courts in determining whether a private cause of action exists in remedial, anti-discrimination congressional enactments.

This Court in *Davis* reserved the question of whether or not Section 504 provides a private cause of action, noting:

> "5. In addition to challenging the construction of §504 by the Court of Appeals, *Southeastern*

> also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. Respondent asserts that whether or not §504 provides a private action, she may maintain her suit under 42 U.S.C. §1983. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them." 99 S.Ct. 2361, 2366 (footnote 5).

Certiorari should be granted to decide the private action question.

Petitioners would argue that no private right of action was created by Section 504. If Congress had intended to grant individuals a private cause of action pursuant to Section 504, it would have done so in clear and unequivocal language. Compare Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq., providing that an aggrieved individual can bring an action in the state or federal courts only after the termination of administrative procedures; and compare the Age Discrimination Act of 1975, 42 U.S.C. §6101 et seq. where Congress specifically amended Section 6104 of the Act (Pub. L. 95-478) in October, 1978, to provide for a private cause of action following the exhaustion of administrative remedies. HEW then issued its proposed Regulations on December 1, 1978, to establish a procedure for the new private cause of action created by Congress under the Age Discrimination Act. 45 CFR Part 90, Section 90.50(a)-(c). However, despite the November, 1978 amendments to the Rehabilitation Act of 1973, HEW has expressly declined to establish a similar procedure for a private cause of action pursuant to Section 504 of the Rehabilitation Act of 1973, noting that it did not have the power to create a private cause of action without statutory authority. See Appendix A, page 378, Title 45, CFR, Part 84.

The question of whether or not Section 504 provides a private cause of action, as held by the Court of Appeals, is of sufficient importance to merit resolution by this Court.

3. This Court should resolve the extent of coverage of Section 504 -- whether 504 applies only to specific programs or activities which receive federal financial assistance or whether Section 504 applies in toto to an institution which receives any federal financial aid;

   There is a conflict in the Circuits on this question and the conflict should be resolved.

In this case, the University received federal financial assistance. The type of aid and for what purpose was not disclosed. Certainly, there was no showing of proof that any of the programs or activities engaged in by Camenisch received financial aid from the federal government.

The Court of Appeals for the Fourth Circuit has seemingly held that there is no 504 coverage unless the program in which discrimination is asserted has received federal financial assistance. *Trageser v. Libbie Rehabilitation Center*, supra. And the Court of Appeals for the Fifth Circuit has required a showing of federal aid to a specific program, a showing of discrimination within a particular program which received federal monies in order to trigger coverage under Title VI §601 (42 U.S.C. §2000d). *Board of Public Institutions of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969). To this same philosophical effect, in determining coverage under Title IX, are the decisions in *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), cert. denied, 100 S.Ct. 467; *Isleboro School Community v. Califano*, 593 F.2d 424 (1st Cir. 1979) cert. denied, 100 S.Ct. 467 and *Junior College District of St. Louis v. Califano*, 593 F.2d 114 (8th Cir. 1979), cert. denied, 100 S.Ct. 467.

Another circuit had reached an opposite conclusion and determined that coverage under a federal act is generated by any federal financial assistance to an institution without regard to whether a particular program or activity that forms the genesis of a law suit has received federal monetary aid. *Bob Jones University v. Johnson*, 396 F.Supp. 597 (D.C.S.C. 1974), aff'd 529 F.2d 514 (4th Cir. 1975). But see *Trageser v. Libbie Rehabilitation Center*, supra.

In the case now before the Court, Petitioners would argue that there has been an insufficient showing that the programs and activities in which Camenish took part received federal financial assistance and that, accordingly, there was no jurisdiction to decide this case under Section 504.

This critical question of the requisite specificity of federal financial assistance should be decided by this Court to resolve the present conflict in the Circuits and provide guidance to all Federal Courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States mail, certified, return receipt requested, to the following attorneys of record for Appellee: Marc P. Charmats, National Association of the Deaf Legal Defense Fund, P.O. Box 1793, Seventh Street and Florida Avenue, N.E., Washington, D.C. 20002; Charles Smith, 812 San Antonio, Suite G-11, Austin, Texas 78100, on this the _____ day of August, 1980.

_____

LONNY F. ZWIENER

APPENDIX

1. Opinion of the Court of Appeals
2. District Court Order
3. District Court Judgment
4. Fifth Circuit Judgment
5. Fifth Circuit Order Overruling Petition for Rehearing

Walter CAMENISCH,
Plaintiff-Appellee,

v.

THE UNIVERSITY OF TEXAS et al.,
Defendants-Appellants.

No. 78-2191.

United States Court of Appeals,
Fifth Circuit.

April 28, 1980.

State of Texas appealed from an order of the United States District Court for the Western District of Texas, at Austin, Jack Roberts, J., directing the University of Texas, under the Rehabilitation Act, to procure and compensate a qualified interpreter to assist plaintiff, a deaf graduate student, in his classes during the 1978 school term. The Court of Appeals, Tuttle, Circuit Judge, held that the district court properly granted preliminary injunctive relief to plaintiff, but the court erred in conditioning the grant of relief on plaintiff's filing of an administrative complaint with the Department of Health, Education and Welfare.

Affirmed in part; vacated in part.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal by the state of Texas from a district court order granting the plaintiff's motion for relief under the Rehabilitation Act of 1973, 29 U.S.C. § 794. The court ordered the University of Texas to procure and compensate a qualified interpreter to assist the

plaintiff in his classes during the 1978 term. As part of that order, the court conditioned its grant of preliminary relief on the plaintiff's filing an administrative complaint with the Department of Health, Education and Welfare (HEW). The court also stayed the action, pending an HEW administrative determination on the merits. We uphold the district court's order granting injunctive relief, but vacate that part of the order conditioning the grant on the filing of an administrative complaint with HEW. We also dissolve the stay of the action.

Walter Camenisch, a deaf graduate student at the University of Texas, filed a complaint and motion for a preliminary injunction on March 1, 1978. In that complaint, he alleged that the University had failed to provide him with sign language interpreter services in violation of Section 504 of the Rehabilitation Act of 1973, and that as a result, he would be unable to complete a master's degree by the end of the 1978 summer term. The plaintiff's completion of a master's degree that summer was a pre-requisite to his maintaining employment as acting dean of students of the East Campus of The Texas School for the Deaf.

Section 504 of the Rehabilitation Act, as written then said:[1]

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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[1]The Act was amended slightly in November 1978.

The University of Texas is a recipient of over $31,400,000 in federal assistance and has agreed to comply with Section 504 as a condition to continued receipt of federal funds. The HEW regulations require colleges to provide auxiliary aids, such as interpreters, for deaf students who cannot otherwise participate in college programs.[2] However, the University denied Camenisch his request for sign language interpreter services on the grounds that he did not meet the University's established criteria for financial assistance to graduate students. The University said he should therefore pay for his own interpreter.

In May 1978, the district court granted the plaintiff's motion for preliminary relief. While not reaching the merits of the claim, the court noted that every court of appeals which had considered the issue had found a private right of action under Section 504. The court further concluded that requiring the plaintiff to exhaust HEW administrative remedies before seeking relief would result in irreparable injury to him, and would defeat his rights under Section 504. The court therefore issued a preliminary injunction relying on this Court's standard for temporary relief, which is substantial likelihood that the plaintiff will prevail on the merits, as set out in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). As stated previously the court also, however, required the plaintiff to post a $3,000 security bond pending the outcome of the litigation pursuant to Rule 65(c) F.R.C.P.; conditioned its grant of relief on the plaintiff's filing an administrative complaint with HEW and stayed the action pending an HEW administrative determination on the merits.[3]

---

[2]See 45 C.F.R. 84.44(d)(1979).

[3]Shortly before this case was argued here, the Department of Health, Education and Welfare issued a letter of findings dated January 24, 1980. In that letter, which was a response to the

We first must determine the proper standard to be used in reviewing the district court's preliminary injunction order. Appellate review of such orders is limited to an examination of whether the district court abused its discretion. *Blackshear Residents Organization v. Romney*, 472 F.2d 1197, 1198 (5th Cir. 1973).

The court below applied this Court's standards for the granting of preliminary relief as set out in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). In *Canal Authority*, this Court delineated four factors that had to be met before a court could grant preliminary relief. Those factors are:

1. Irreparable harm to the plaintiff from failure to issue the injunction.

2. The relative lack of harm to the defendant from issuance of the injunction.

3. The public interest.

4. Probability that the plaintiff will ultimately succeed on the merits.

In this case, it is clear that Camenisch would have suffered irreparable harm from a failure to issue the injunction. Without an interpreter, he would have been unable to complete the academic program in which he was enrolled, would not have been able to earn his degree, and thus might have lost his position as Acting Dean of Students. The harm to the defendant of granting the injunction was not great either. This question of the balance of hardship—how the plaintiff's harm compares to the harm to the defendant if the preliminary injunction is granted—must be considered

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administrative complaint filed in May 1978, HEW found that the University was in violation of Section 504 by failing to provide educational auxiliary aids to students with impaired sensory skills.

in the context of the requirement of posting a bond. *See Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 674, 88 L.Ed. 834 (1944); *Note, Interlocutory Injunctions and the Injunction Bond*, 73 Harv.L.Rev. 333 (1959). In this case, the posting of the $3,000 bond by the plaintiff clearly protected the defendant from any permanent harm.

The final two considerations—the pubic interest and the probability that the plaintiff will ultimately succeed on the merits, can only be considered by an examination of the merits of Camenisch's claim. We therefore turn to an examination of that claim.

I

The district court found that every United States Court of Appeals which had attempted to determine whether the Rehabilitation Act conferred a private individual right of action under Section 504 to enforce the Act through injunctive relief had found that it did. The University argues here, again, that there is no private right of action under Section 504, even in suits for injunctive relief.

As an initial point, it has been suggested to this Court that this issue is now moot, because Camenisch has received the relief he sought. Such an argument shows a basic lack of understanding of what is at stake in this dispute. The University provided Camenisch with an interpreter *at its own expense* under order of the district court. The University argues, in effect, that Camenisch should have had to pay for that interpreter, since they were under no obligation to provide one. Camenisch has posted a bond that can be used to repay the appellants, if he loses this appeal. Therefore, despite the fact that Camenisch has graduated, a justiciable issue remains: whose responsibility is it to pay for this interpreter?[4]

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[4]Because the issue is stated in this manner does not mean that this is a suit for damages. Camenisch filed a claim for injunctive relief

This is simply another way of stating the traditional rule that issues raised by an expired injunction are not moot if one party was required to post an injunction bond. *Liner v. Jafco, Inc.*, 375 U.S. 301, 305, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978).[5]

Turning to the merits, we find ourselves in complete agreement with the other Courts of Appeal that have decided this issue and found such a right of action, applying the test of *Cort v. Ash*, 442 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *See Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *National Association for the Advancement of Colored People v. The Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979). We agree with the *Cort analysis* of Section 504 undertaken in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-86 (7th Cir. 1977) in which that Court found an explicit congressional intent to create such a private right of action and found that such a right was consistent with the purposes of the legislation.[6]

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and the appeal is from an injunction. Therefore, this case concerns only a right of action for injunctive relief.

[5]The fact that HEW, in response to Camenisch's administrative complaint, had issued a letter of findings that the University was in violation of Section 504 by failing to provide interpreters to assist students like Camenisch, does not render this case moot either. We hold in Part II of this opinion that the administrative procedures under the Rehabilitation Act are not appropriate to private individual suits to enforce Section 504 in the courts. Therefore, Camenisch's court claim stands by itself.

[6]*See e.g.*, The Committee Report to the Senate, which stated:

We also take note, of the Supreme Court's decision in *Campbell v. Kruse*, 434 U.S. 808, 98 S.Ct. 38, 54 L.Ed.2d 65 (1977) in which the Supreme Court vacated the judgment of a three-judge district court, which held that a Virginia statute, providing partial tuition grants to handicapped children who were not affluent enough to take advantage of these partial grants. The Supreme Court directed the district court to decide the plaintiffs' claim "based on the federal statute, Sec. 504 of the Federal Rehabilitation Act of 1973." 434 U.S. at 808, 98 S.Ct. at 38. With this ruling the Supreme Court seemingly acknowledged the judicial authority to entertain private suits for injunctive relief under Section 504.[7]

The appellants agrue here that *Lloyd* and other cases were decided before HEW promulgated regulations designed to implement Section 504. Their position apparently is that the legislative history of the Act shows a Congressional intent that any judicial action under the Act be limited to a post-administrative remedy judicial review. In *Lloyd*, the Seventh Circuit said:

> We expressly leave open as premature the question whether, after consolidated

---

> This approach to implementation of Section 504, which closely follows [Title VI], ... would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.* (Emphasis and words in brackets added.) S.Rep. No. 93-1297, 93 Cong. 2d Sess. 39-40, *reprinted in* 4 U.S. Code Cong. & Admin. News, pp. 6373, 6391 (1974).

[7]*See* also the opinion of Justice Stevens in *Regents of University of California v. Bakke*, 438 U.S. 265, 420 n. 27, 98 S.Ct. 2733, 2748 n. 27, 57 L.Ed.2d 750 (1978) which seems to recognize that Section 504 of the Rehabilitation Act can be enforced by private actions in the courts.

> procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a *posterior* judicial review. (Citations omitted.)

548 F.2d at 1286 n. 29.

We reject this argument. First, issuance of these regulations preceded the Supreme Court's decision in *Campbell v. Kruse*. Second, the administrative procedures adopted for enforcement of Section 504 do not constitute the "consolidated procedural enforcement regulations" contemplated in *Lloyd, supra*, 548 F.2d at 1286 n. 29. As HEW has itself explained, these procedures are only intended to be in effect until "such time as they are superseded by . . . a consolidated procedural regulation applicable to all . . . civil rights statutes and executive orders administered by the Department." 45 C.F.R. Part 84, App. A, p. 394 (1979).[8] Third, in the recent case of *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court found a private right of action under Title IX. The administrative procedures applicable to that right of action are identical to the

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[8]This is not to say that once such consolidated procedural regulations are in effect, we will adopt the appellant's view. We specifically reserve judgment on that question.

procedures applied to complaints under Section 504. The regulations implementing Section 504 adopt the Title VI enforcement procedures, 45 C.F.R. §84.-61 (1979), the same administrative mechanisms used to enforce Title IX, 45 C.F.R. §86.71 (1979). When the Supreme Court found a private right of action under Title IX despite these regulations, it implicitly rejected the argument that these same procedures militated against the finding of a private right of action under Section 504.[9] Therefore, we find that Section 504 creates a private individual right of action for equitable relief.[10]

In a letter to this Court, the appellant has made the additional argument that the Supreme Court's recent decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct.2361, 60 L.Ed.2d 980 (1979) bars relief for this plaintiff. In *Southeastern Community College*, Mrs. Davis, a deaf person, sought admission to Southeastern's Associate Degree Nursing program. Completion of study in that program would qualify her for certification as registered nurse. She was denied admission, solely because of her disability. She brought suit claiming discrimination under Section 504, but the Supreme Court unanimously held there was no illegal discrimination. The Court found that Mrs. Davis was not an "otherwise qualified handicapped individual

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[9]*See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1083 (5th Cir. 1980):

> "Moreover in *Cannon v. University of Chicago*, the Supreme Court found an implied cause of action in Title IX . . ..
>
> The parallel in construction between Title IX and Section 504 is evident."
>
> [Citations omitted.]

[10]We expressly reserve judgment on the question whether Section 504 creates a private right of action in suits for damages. *See Miener v. Missouri*, _____F.Supp._____(E.D.Mo. 1980); *Patton v. Dumpson*, _____F.Supp._____(S.D.N.Y. 1980).

within the meaning of § 504," holding that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* 99 S.Ct. at 2367. The appellant argues that the holding in *Southeastern Community College* is applicable here.

We disagree. The decision in *Southeastern Community College* was clearly not intended to bar relief under this statute for all handicapped people in the future. In *Southeastern Community College*, the Supreme Court said:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear .... Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

Id. at 2370.

In this case, HEW regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters.[11] However, the HEW regulations did not require the sort of "individual attention" services that Mrs. Davis required to get through nursing school, an educational program that provided much more than simply academic training, *Southeastern Community College* at 2368-69.

Like the Supreme Court, we also take special note of the analysis of the district court in *Davis v. Southeastern Community College*, 424 F.Supp. 1341 (E.D.N.C., 1976),

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[11]*See* 45 C.F.R. § 84.44(d)(2) (1979).

which found that Mrs. Davis had not been discriminated against. There, the Court said:

> [it] would most probably be impermissible to exclude a blind or deaf person from admission to a law school, if academically qualified. However, reason dictates that it would be entirely permissible to exclude a person without sight from a position as a truck driver or to refuse a person who must read lips to a position as a telephone operator. Otherwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in site of the handicap, if proper training and facilities are suitable and available. The major problem with the plaintiff's [Davis's] contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession.

Id. at 1345 [words in brackets added.]

Read in this light, the Supreme Court's decision in *Southeastern Community College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training. While such a rule obviously needs more clarification, it is clear that in this case, Camenisch's claim can succeed on the merits, despite the holding in *Southeastern Community College*, since he can obviously perform well in his profession.[12]

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[12]This is consistent with the analysis of this case, undertaken in the excellent article, Note, Defining the Rights of the Handicapped Under Section 504 of the Rehabilitation Act of 1973; Southeastern Community College v. Davis, 24 St. Louis L.J. 159 (1979).

II

Given our determination that Camenisch's claim succeeds on the merits, and our previous analysis of the first two factors that have to be met before a court can grant preliminary injunctive relief, we now turn to consideration of the administrative exhaustion requirement. The district court found that Camenisch did not need to exhaust HEW administrative remedies before seeking injunctive relief. Resort to such procedures, the court said, would result in "irreparable injury" to him, because the regulations contain no provisions for providing the sort of emergency relief he seeks. However, the district court, as stated earlier, required the plaintiff to file an administrative complaint with HEW; stayed further proceedings pending this final administrative determination and required Camenisch to post a $3,000 security bond. Therefore, the district court must have reasoned that the administrative exhaustion requirement was applicable to private rights of action under Section 504 filed in the courts, when no exceptions to the exhaustion doctrine were present.

It has been suggested here too, that even if Camenisch's claim for relief is not moot, the exhaustion issue is moot because HEW recently has issued a letter finding the University in violation of Section 504 in failing to provide educational auxiliary aids to students with impaired sensory skills. *See* Note 3. We reject this suggestion. We cannot determine adequately both the existence and the scope of a private right of action under Section 504 in the courts without considering the extent to which that right of action is limited by an administrative exhaustion requirement. An inappropriate exhaustion requirement could so limit the existence of the private right of action we find today that it would effectively do away with our holding in Part I, that it was the Congressional intent that plaintiffs have access to the courts to enforce individual

causes of action under Section 504. A decision on the existence of such a cause of action is so inextricably bound up with a decision about exhaustion, that we must also consider the exhaustion issue here. *Cf. Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).[13]

The appellant argues that no exceptions to the exhaustion doctrine were present in this case, and that the district court should have required Camenisch to exhaust his administrative remedies before granting the preliminary injunction. Camensich argues, in opposition, that the district court decided the exhaustion issue correctly. He says that a number of exceptions to the exhaustion requirement are applicable here. First, the HEW administrative procedures contain no administrative enforcement mechanism to provide the emergency relief sought here. 45 C.F.R. § 84.62, 80.8(a) (1979); *see Barnes v. Converse College*, 436 F.Supp. 635 (D.S.C. 1977). It is well-settled that where there is no adequate administrative procedure available, the exhaustion doctrine does not apply. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied* 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967). Second, excessive administrative delays render HEW's administrative remedies inadequate to help him and therefore a waiver of the exhaustion requirement is justified. *Walker v. Southern Railway Co.*, 385 U.S. 196, 198, 87 S.Ct. 365, 366, 17 L.Ed.2d 294 (1966); *cf. White v. Mathews*, 559

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[13]*Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) provides an interesting analogy to the case. In *Sibron*, the Supreme Court found the appellant's criminal appeal not moot, even though he had finished serving his criminal sentence, because of the collateral consequences of a criminal conviction. In this case, if this Court were to find the exhaustion issue moot, it would have severe collateral consequences on future plaintiffs who seek to bring actions under Section 504.

F.2d 852 (2nd Cir. 1977), *cert. denied* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Third, there is no need to exhaust an administrative remedy where the administrative agency has waived the exhaustion requirement, which the Office of Civil Rights of HEW has done in these sorts of cases. *Cf. Weinberger v. Salfi*, 442 U.S. 749, 765—767, 95 S.Ct. 2457, 2466—2467, 45 L.Ed.2d 522 (1975).

We find all of these arguments persuasive as to why an appropriate exhaustion requirement would have to be waived in this case. However, we disagree with the district court's apparent assumption that the HEW administrative procedures are relevant to a private individual right of action for injunctive relief under Section 504 pursued in the courts. The HEW administrative procedures do not provide the most appropriate or exclusive remedy to vindicate personal Section 504 rights. Because we find that a plaintiff is under no obligation to pursue administrative remedies in Section 504 actions, we vacate that part of the district court's order conditioning its grant of preliminary relief on the requirement that the plaintiff file an administrative complaint with HEW.[14] Since Camenisch was under no obligation to pursue these administrative procedures, there was obviously nothing he needed to exhaust before the court could grant relief.

In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court found an implied right of action under Title IX. As stated previously, the regulations HEW had adopted to implement Section 504 adopt the Title VI enforcement

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[14]This inquiry goes to the district court's view of the law concerning exhaustion. Since this was not part of the district court's decision as to whether the issuance of an injunction was necessary, it is not examined under the *Blackshear Residents Organization* "abuse of discretion" standard. Instead, it is examined in the way we examine trial court determinations of law.

procedures, 45 C.F.R. § 84.61 (1979), the same administrative procedures used to enforce Title IX, 45 C.F.R. § 86.71 (1979). In *Cannon*, the Supreme Court said that the complaint procedures adopted by HEW did not allow the complainant to participate in the administrative investigation or subsequent enforcement proceedings. If a violation was found, a resulting compliance agreement might not include relief for the complainant. Furthermore, the Court found that the ultimate remedy, a complete cut-off of federal funds to the institution was an inappropriate result for an individual complainant. 99 S.Ct. at 1962-63, n. 41. For all of these reasons and others, the Supreme Court concluded that private suits to enforce individual causes of action are appropriate in Title IX cases, without resort to administrative mechanisms. The same reasoning applied here because the enforcement regulations are the same. *See Upshur v. Love*, 474 F.Supp. 332, 341 n. 23 (N.D. Cal., 1979). "[W]hile the administrative process may effectively provide, by way of the threat of a funding termination, an incentive to comply with Section 504, it provides no means by which an individual can obtain personal redress for a Section 504 violation." *Whitaker v. Board of Higher Ed. of City of New York*, 461 F.Supp. 99, 108 (E.D.N.Y., 1978).

In *Lloyd*, discussed earlier in Part I, the Seventh Circuit stated that "[t]here being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies." 548 F.2d at 1287 *citing Rosado v. Wyman*, 397 U.S. 397, 405-06, 90 S.Ct. 1207, 1214-15, 25 L.Ed.2d 442 (1970). As we stated earlier, the promulgation of HEW regulations since the *Lloyd* decision has not changed the basis of that decision. The HEW administrative process does not provide the most appropriate remedy to vindicate these private causes of action.

It is clear why the Supreme Court reached the result it

did in *Cannon*. The administrative enforcement process, established by Congress as a part of Title VI, centers entirely on the question of whether, in light of the policies and practices of a recipient of federal assistance, federal funds should continue to flow to that recipient. It is predicated upon the need by the Secretary to monitor and enforce the nondiscrimination provisions of agreements between HEW and the recipients of federal assistance. *See* 45 C.F.R. 80.8-80.9 (1979). The purpose of the administrative framework is to provide a forum in which to initiate fund termination proceedings in the event a grant recipient fails to meet its obligations. It is not intended to provide a forum for program beneficiaries to press claims of discrimination against grant recipients. *See* 45 C.F.R. 80.8(a), 80.10(f) (1979).

The remedy that emerges from such a hearing process is not designed to aid petitioners like Camenisch at all. A decision to terminate funding of a non-complying recipient could work to the disadvantage of a complainant like Camenisch, since such a cut-off could guarantee that no further services accrue to the complaining party. There is no specific vindication of personal rights within the HEW administrative procedure for complaining parties like Camenisch.[15]

Our holding that private individual suits to enforce Section 504 rights can be brought without previous resort to administrative remedies, is entirely consistent with HEW enforcement efforts under the statute. The appellees have filed in this Court the affidavit of

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[15]*See Regents of the University of California v. Bakke*, 438 U.S. 265, 419 n. 26, 98 S.Ct. 2733, 2748 n. 26, 57 L.Ed.2d 750 (1978) (concurring opinion of J. Stevens) for a similar analysis of the distinction between suits to enforce personal rights and administrative proceedings aimed at government fund termination. *See also Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir. 1967), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967).

Michael Middleton, Director of the Division of Policy and Procedure in the Office of Civil Rights (OCR) in HEW, in which he says that it is OCR policy that Section 504 complainants should be allowed to file civil actions in the federal courts, without exhausting either the grievance procedures established by a recipient or HEW's own complaint procedures. We think it makes good sense and was the Congressional intent that Section 504 rights be protected by grant termination through the administrative process or by private suits to eliminate the proscribed discrimination.[16]

AFFIRMED IN PART AND VACATED IN PART.

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[16]*Cf. Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) in which the Supreme Court rejected the arguments of defendants who claimed that a state welfare regulation was not subject to attack in a legal suit by a private plaintiff because HEW had the power to terminate federal funding for non-compliance with federal regulations.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WALTER CAMENISCH,	*	
	*	
Plaintiff	*	
	*	
V.	*	No. A-78-CA-061
	*	
THE UNIVERSITY OF TEXAS, ET AL.,	*	
	*	
	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

Came on on the 11th day of May, 1978, Plaintiff's action for preliminary relief under the Rehabilitation Act of 1973, §504, 29 U.S.C. §794, and under the Fourteenth Amendment to the United States Constitution. Plaintiff is a deaf person attending Graduate courses at Defendant institution as a prerequisite to maintaining his current employment as acting Dean of Students on the East campus of the Texas School for the Deaf. Attached hereto are 18 stipulations of facts and five exhibits which thoroughly set forth the pertinent facts in this matter. Defendants assert that they follow all policies mandated by the Rehabilitation Act in that they treat all handicapped students on the basis of individual need and that Plaintiff can hire his own interpreter. They also urge that no private right of action exists for Plaintiff.

The stipulations entered into make clear that Plaintiff meets the test of being a handicapped person under the Rehabilitation Act. That Act has adopted Title VI interim procedures for its implementation which require filing a complaint with HEW and awaiting investigation by that agency.

It appears that every United States Court of Appeals which has attempted to determine whether the Act confers a private right of action as well as an administrative right has held that, under the test in *Cort v. Ash*, 442 U.S. 66, such a right must be implied from §504 of the Act, 29 U.S.C. §794, as amended. *Davis v. Southeastern Community College*, No. 77-1237 (4th Cir., Mar. 28, 1978); *Lloyd v. Regional Trans.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977). In addition, numerous federal district courts have determined that a private right of action exists under §504. See *Hairston v. Drosick*, 423 F.Supp. 180 (S.D.W.Va. 1976); *Borden v. Rohr*, No. 750844 (S.D. Ohio, Dec. 31, 1975); *Mattie T. v. Holladay*, C.A. No. D.C. 75-31 (S.D. Miss. July 28, 1977); *Bartels v. Biernat*, 405 F.Supp. 1012 (E.D. Wisc. 1977).

Defendant relies heavily, in arguing against such private right of action, on the case of *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976); however, that Court was contemplating Title IX Educational discrimination remedies, not those promulgated under §504. Furthermore, that same circuit found a private right of action to exist under §504 of the Rehabilitation Act in the *Lloyd* case, *supra*.

Since it is now clear that Legislature has adopted interim Title VI administration procedures, it is necessary to inquire as to whether relief will be meaningful and in accordance with the underlying intent of the Act. Several Courts have held that despite failure to seek any administrative recourse, administrative exhaustion should not be imposed in all instances if there is no realistic possibility of a meaningful remedy. *Alexander v. Yale*, N-77-277 (D. Conn., Dec. 21, 1977); *Grossman v. Texas Tech University*, CA-5-77-23 (N.D. Tex., Nov. 18, 1977), wherein the Court denied Defendant's Motion to dismiss a Title IX private action, stating:

> In the absence of a procedure through which the individuals protected by Section 601's prohibition may assert their rights under it, violations of the law are cognizable by the Courts.

Since Title VI procedures have been specifically adopted for interim enforcement of §504, the Court must consider the time involved for exhaustion of such procedures and the effect on Plaintiff. The applicable HEW regulations contain no provisions for providing emergency relief of the nature requested by Plaintiff. All administrative complaints are treated similarly. Plaintiff submits, in his Memorandum in Opposition to Defendants' Motion to Dismiss, the Office for Civil Rights' Annual Operating Plan for Fiscal Year 1978 reveals that only 26 of 756 handicap complaints filed in 1978 will be investigated. An HEW finding in Plaintiff's favor one or two years from now will give him no effective relief whatsoever, for, as the stipulations show, he may very well have lost his employment by then. If, on the other hand, HEW found for Defendants, it could order Plaintiff to reimburse the cost of interpretive services paid by Defendants. Plaintiff has previously offered such a course of action to Defendants, including his willingness to post an appropriate bond, but Defendants are unwilling.

Defendants argue also that the *Lloyd* holding applies only in the absence of "consolidated procedural enforcement regulations ... to implement §504 . . .", *Lloyd*, at 1286, apparently assuming that the current interim guidelines are such regulations. However, the HEW analysis of the Act states that the Title VI procedures are to be used in implementing §504 "until such time as they are superseded by the issuance of a *consolidated procedural regulation* . . .", 42 Fed. Reg. 86, p. 22865.

Even if the Court finds no private right of action under §504, in light of the fact that exhaustion

procedures are meaningless with respect to this Plaintiff, the Court should apply the Fifth Circuit standard for temporary relief to see if the injunction sought is appropriate. See Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). There is a substantial likelihood that Plaintiff will ultimately prevail on the merits. In balancing this factor with the relative costs to the parties, the public interest, the state requirement that Plaintiff obtain his Master's degree, and the potential irreparable injury resulting from Plaintiff's loss of employment, a preliminary injunction granting Plaintiff the relief sought will issue. Barnes v. Converse College, 436 F.Supp. 632 (D.S.C. 1977); Crawford v. University of North Carolina, 440 F.Supp. 1047 (M.D.N.C. 1977). As the Court in Barnes states, ". . . the refusal to grant Plaintiff the relief at this time would defeat any rights she may have under the statute and regulation, and by failing to give effect to Plaintiff's rights would cause her immediate and irreparable injury . . ." 436 F.Supp. at 638.

Essentially, preliminary relief for Plaintiff equates to full relief, since by the time exhaustion is completed, Plaintiff will probably have both his graduate degree and a permanent job. But since Plaintiff is obviously within the class of persons intended to be protected by the Act, the lack of a course of meaningful administrative relief should not be allowed to stand in Plaintiff's way and cause him irreparable harm. This is particularly true if reimbursement to Defendants is made a condition of the injunction upon a later determination by HEW that is negative to Plaintiff. This follows the concept set out in *Crawford* and several other cases cited by Plaintiff. It is to be noted that, as a condition of preliminary relief, that Court required Plaintiff to file an administrative complaint with HEW. This was filed November 22, 1977, and has yet to be acted upon.

Defendants' 11th Amendment and Sovereign Immunity arguments have already been disposed of by the cases of *Elderman v. Jordan*, 415 U.S. 651 (1974), and *Milliken v. Bradley (Milliken II)*, _____ U.S. _____, 97 S.Ct. 2749 (1977). Plaintiff seeks only non-monetary injunctive relief, not a cash award.

As the Court reaches this decision on statutory grounds, there is no need to reach the constitutional issues raised by parties.

It is, accordingly, ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue as to Defendants, in their official capacities, to procure an interpreter or other effective method of making orally delivered course materials available to Plaintiff during his completion of his Master's work at Defendant University. As a condition of such relief, Plaintiff shall post a security bond in the amount of *$3000.00* pending the outcome of this litigation pursuant to Rule 65(c), F.R.C.P.

It is further ORDERED that this action be stayed, pending a final administrative determination on the merits, and that as a condition of preliminary injunctive relief, Plaintiff be required to initiate a complaint with HEW requesting the relief sought herein. Furthermore, the Court suggests Plaintiff consider seeking *amicus curiae* intervention in this matter by the Secretary of HEW.

ENTERED this *17* day of *May*, 1978, at Austin, Texas.

/s/

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS—AUSTIN DIVISION

CIVIL ACTION FILE NO. A-78-CA-061

WALTER CAMENISCH

vs. JUDGMENT

UNIVERSITY OF TEXAS, Et al

This action came on for ~~trial~~ (hearing) before the Court, Honorable JACK ROBERTS, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that a preliminary injunction issue as to Defts', in their official capacities, to procure an interpreter or other effective method of making orally delivered course materials available to Pltf during his completion of his Master's work at Deft., University. As a condition of such relief, Pltf shall post a security bond in the amt. of $3000.00 pending the outcome of this litigation pursuant to Rule 65(c), F.R.C.P. Further ORDERED that this action be STAYED, pending a final administrative determination on the merits, and that as a condition of prel inj relief, Pltf be required to initiate a compl't. with HEW requesting the relief sought herein. Furthermore, the Court suggests Pltf consider seeking *amicus curiae* intervention in this matter by the Sec. of HEW.

Dated at Austin, Texas, this 17th day of May, 1978.

WILLIAM G. PUTNICKI

.....

Clerk of Court

BY /s/

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * *

October Term, 19

* * *

No. 78-2191

* * *

D.C. Docket No. A-78-CA-061

WALTER CAMENISCH,

Plaintiff-Appellee,

versus

THE UNIVERSITY OF TEXAS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed in part, and vacated in part;

It is further ordered that defendants-appellants pay to the plaintiff-appellee, the costs on appeal, to be taxed by the Clerk of this Court.

April 28, 1980

Issued as Mandated: Jun 6 1980

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

May 29, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-2191 - Walter Camenisch -vs- The University of Texas, Et Al

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 10) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

BY /s/ _____

Ms. Martha H. Allan
Mr. Sheldon E. Steinbach
Mr. Marc P. Charmatz
Mr. Walter W. Barnett

NO. 80-317

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners

V.

WALTER CAMENISCH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Relevant Docket Entries

03-01-78	1	Original Complaint, Filed.
03-01-78	2	Motion for Preliminary Injunction, WITH Memorandum in Support of Pltfs' Motion For Preliminary Injunction, Filed.
03-03-78		Notices of Hearing on Preliminary Injunction set for Thursday, May 11, 1978 @ 9:30 a.m. mailed to attys & Defts.,
03-03-78		Summ/Compl't issued to DUSM (5)
03-17-78	3	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-14-78 to W. O. Schultz, Atty & Agt for Lorene Rogers, Pres U.T., by DUSM Atkison, Jr., Filed $3.00
03-09-78	4	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-3-78 to Judy Johns, Desig. Agt for the U.T. by DUSM Atkison, Jr., Filed $3.00.
03-09-78	5	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-3-78 to Judy Johns, Desig. Agt for Charles Le Maistre, Chancellor of UT by DUSM Atkison, Jr., Filed $3.00.
03-09-78	6	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-9-78 to Allan Shivers by DUSM Hoffmann, Filed $3.00
03-09-78	7	Summ/Compl't/Mtn for Prel. Inj., ret'd *UN*-ex 3-9-78 to Robert Brown by DUSM Atkison, Jr., Filed (Ronald M. Brown only Brown at the U.T. campus)
03-24-78	8	Motions To Dismiss And Original *ANSWER*, Filed.
05-10-78	9	Memorandum in Opposition To Deft's Motion To Dismiss, WITH Attachments Filed.
05-11-78	10	Stipulation of Facts, WITH Exhibits #1,2,3,4, & 5.
05-11-78	11	*MINUTES OF CIVIL PROCEEDINGS* Pltf announced ready, Mr. Charmatz & Mr. Du Bow admitted for this case only, Lil Browning sworn as interpretor. Stipulations read into record. Pltfs Testimony began and concluded, Pltf.

rested.
Deft. rested without putting on any testimony.
Pltf argued
Deft argued
Pltfs presented rebuttal argument

05-11-78 12 WITNESSES SWORN List, Filed

05-11-78 13 PLAINTIFF'S EXHIBITS LIST, Exhibits #6 & 7 attached to List.

TAKEN UNDER ADVISEMENT

05-17-78 14 MEMORANDUM OPINION AND ORDER that a preliminary injunction issue as to Defts', in their official capacities, to procure an interpreter or other effective method of making orally delivered course materials available to Pltf during his completion of his Master's work at Deft. University. As a condition of such relief, Pltf shall post a security bond in the amt. of $3000.00 pending the outcome of this litigation pursuant to Rule 65(c), F.R.C.P. Further ORDERED that this action be STAYED, pending a final administrative determination on the merits, and that as a condition of prel inj relief, Pltf be required to initiate a compl't with HEW requesting the relief sought herein. Furthermore, the Court suggests Pltf consider seeking *amicus curiae* intervention in this matter by the Sec. of HEW, Filed.

05-17-78 14a Clerk's Judgment on Decision By The Court, Filed.

05-19-78 15 Application For Stay Pending Appeal by Defendants., Filed.

05-19-78 16 NOTICE OF APPEAL from the memorandum & order granting injunctive relief in favor of the pltf herein & against the defts, & this appeal is an interlocutory appeal as a matter of right pursuant to 28 U.S.C.

		1292(a)(1). Certified copies of the Notice of Appeal & docket sheets to the Fifth Circuit, cc to all attys.
05-22-78	17	ORDER Denying Defts' application for stay pending appeal, Filed.
06-05-78		Bond with National Surety Corporation surety, submitted for Judges' Approval, Filed.
05-30-78	18	Notice of filing of Compl't, etc., with the Office For Civil Rights Dept., of HEW from The Nat'l Assoc of the Deaf Legal Defense Fund. Filed.
06-05-78	19	ORDER Approving Pltfs' Bond with National Surety Corporation, Filed.
06-23-78	20	Order extending Time for Transmitting Record on Appeal, filed. Copy to parties and 5th Circuit Court of Appeals and Court rpr.
07-07-78	21	Transcript of Hearing on Preliminary Injunction, Filed.
06-28-78	22	ORDER that appellants' motion for stay pending appeal is DENIED, from the U.S. Court of Appeals for the Fifth Circuit, Filed.
06-28-78	23	CORRECTED ORDER that appellants' motion for stay pending appeal is DENIED, from the U.S. Court of Appeals for the Fifth Circuit, Filed.
07-12-78	24	Preliminary Order entered that discovery to be concluded by 12/12/78 and attnys to have preliminary conference by 1/12/79, Filed. Copy to attnys of record.
07-26-78		Entire original file, certified copy of docket sheet, and transmittal letter mailed to the Fifth Circuit Court of Appeals, also Transcript of proceedings on preliminary injunction, cc of transmittal to all attys of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

HEADING OMITTED

VERIFIED COMPLAINT
JURISDICTION

1. This is an action for declaratory, preliminary, and permanent injunctive relief on behalf of plaintiff, Walter Camenisch, a deaf graduate student at the University of Texas at Austin. Defendants have discriminated against the plaintiff by refusing to provide the plaintiff with interpreter services at University expense. Without a sign language interpreter, plaintiff is unable to understand and participate in the University classes. The failure of defendants to provide plaintiff with interpreter services violates the Rehabilitation Act of 1973, Section 504 29 U.S.C. § 794, as amended; in that both the Act and the regulation prohibit discrimination against handicapped persons by recipients of federal financial assistance. Plaintiff additionally claims a violation of the Fourteenth Amendment to the United States Constitution.

2. Jurisdiction over plaintiff's federal constitutional claim under the Fourteenth Amendment and plaintiff's statutory claim is conferred on this Court by 28 U.S.C. § 1341(3) and (4) and 28 U.S.C. § 2201.

3. Monetary damages are inadequate, as plaintiff's federal constitutional and statutory rights are being infringed. Plaintiff will suffer irreparable harm from defendants' actions, policies and practices, if the same are permitted to continue. Accordingly, injunctive relief is necessary.

PARTIES

4. Plaintiff, Walter Camenisch, is a citizen of the United States and a resident of Austin, Texas. He is deaf and therefore a handicapped individual within the meaning of § 7(6) of the Rehabilitation Act of 1973, 29 U.S.C. § 706(6).

He is acting Dean of Students on the East Campus of the Texas School for the Deaf, in Austin, Texas.

5. The defendant, University of Texas, is a private institution of higher learning, which receives both federal and state financial assistance.

6. The defendant, Charles A. LeMaistre, is the Chancellor of the University of Texas, and is responsible for the administration of defendant University. He is sued individually and in his official capacity.

7. The defendant, Allan Shivers, is the Chairman of the Board of Regents of the University of Texas, which establishes the policy of the defendant University. He is sued individually and in his official capacity.

8. The defendant Lorene Rogers, is the President of the University of Texas at Austin and is the chief administrative officer of the University. She is sued individually and in her official capacity.

9. The defendant, Ronald M. Brown, is the Vice President for Administrative Services of the University of Texas at Austin. He is sued individually and in his official capacity.

NATURE OF THE ACTION

10. Plaintiff is currently holding the position of Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a master's degree, plaintiff has been appointed on an acting basis and is required, by the Texas School for the Deaf, to take courses in Educational Administration in order to obtain his master's degree. See copy of a letter dated August 22, 1977, from Virgil E. Flathouse, Superintendent, Texas School for the Deaf, attached to this Complaint and marked Exhibit #1.

11. In the summer of 1977, plaintiff requested that the University of Texas at Austin provide funds for the payment of an interpreter so that he could attend classes at that institution during the winter and spring semesters. In a letter dated October, 1977, defendant, Ronald M. Brown, informed plaintiff that the University of Texas at Austin would not provide such funds. A copy of this letter is attached to this Complaint and marked Exhibit #2.

12. Plaintiff submitted a similar request to the Texas Rehabilitation Commission. In a letter dated October 11, 1977, the Texas Rehabilitation Commission advised plaintiff that the Commission would not provide plaintiff with funds for interpreter services. A copy of this letter is attached to this Complaint and marked Exhibit #3.

13. Plaintiff, through his attorney, again requested that the University of Texas at Austin provide funds for interpreter services in a letter dated December 12, 1977. A copy of this letter is attached to this complaint and marked Exhibit #4.

14. The December 21, 1977 letter from the defendant University, contained yet another refusal to provide funds for interpreter services. A copy of this letter is attached to this Complaint and marked Exhibit #5.

CLAIMS

First Claim: The Rehabilitation Act of 1973

15. The Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794, provides that:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

16. 45 C.F.R. § 84.44(d) provides that:

> (d) Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

17. The discriminatory denial by defendants of interpreter services at University expense to plaintiff, who has a hearing disability, violates plaintiff's rights under the Rehabilitation Act of 1973, and the regulation promulgated thereunder, 45 C.F.R. 84.44(d).

18. Defendants' policies and actions in denying interpreter services at University expense have no rational relationship to any governmental interest, and constitute invidious and arbitrary discrimination.

Second Claim: Denial Of Equal Protection

19. Defendants' policies and practices violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and state a claim under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Court:

1. Declare that the policy and practice of the defendants violates the Rehabilitation Act of 1973 and § 84.44 of the regulation to this Act, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

2. Preliminarily and permanently enjoin defendants, their agents, employees, successors in office, and all persons acting in concert with them from refusing to provide

interpreter services to the plaintiff at defendant's expense.

3. Preliminarily and permanently order defendants to appoint an interpreter for the plaintiff while he is a student in good standing at the defendant University.

4. Award plaintiff his costs and grant his attorneys a reasonable counsel fee.

5. Grant plaintiff such additional or alternative relief as this Court may deem necessary and proper.

6. Retain jurisdiction of this action until defendants have fully complied with the Order of this Court.

Respectfully submitted,

SIGNATURES AND VERIFICATION OMITTED

Exhibit #1

Texas School for the Deaf
1102 South Congress Avenue
Austin, Texas 78704
(512) 442-7821

August 22, 1977

TO WHOM IT MAY CONCERN:

This letter is to verify that the position of Dean of Students on the East Campus of the Texas School for the Deaf is now being filled by Mr. Walter Camenisch, and it does require a master's degree.

In view of the fact that Mr. Camenisch does not yet have a master's degree, he has been appointed to this position on an acting basis.

Sincerely,
/s/ V. Flathouse
Virgil E. Flathouse, Ph.D.
Superintendent

VEF:sm

Exhibit #2

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

October 21, 1977

Walter Camenisch
4705 Trailcrest Circle
Austin, Texas 78735

Dear Mr. Camenisch:

It is my understanding that you have requested financial assistance for an interpreter for the deaf and that you have met with Mrs. Shirley Binder, Director of Student Financial Aid, in this regard. It is also my understanding that this request is related to your interpretation of Section 504 of the Rehabilitation Act of 1973, and I am writing you in my role as Coordinator of the University's implementation of those regulations.

We anticipate that there may be instances where The University of Texas at Austin will consider the possibility of providing individual services such as these when properly advised and they are not available from such agencies as the Texas Rehabilitation Commission or the Texas Commission for the Deaf. However, as a matter of policy we have determined that such assistance will be based on a reasonable interpretation of financial need on an individual basis, using guidelines already in effect for Federal and other financial assistance. Mrs. Binder informs me that you do not have financial need according to these guidelines, so we shall not provide this aid unless your circumstances change.

If you have further questions concerning your situation, you should feel free to contact Ms. Dora Savedra in the Of-

fice of the Dean of Students.

Sincerely,
/s/ Ronald M. Brown
Ronald M. Brown
Vice President for Administrative Services

RMB/mam

cc: Shirley Binder
Dora Savedra

Exhibit #3

VOCATIONAL REHABILITATION DIVISION
OF THE
TEXAS REHABILITATION COMMISSION

October 11, 1977

Mr. Walter Camenisch
4705 Trail Crest Circle
Austin, Texas 78735

Dear Mr. Camenisch:

After careful consideration, I have determined that you do not meet the requirement of having a substantial employment handicap in order to qualify for our services.

Therefore, the Texas Rehabilitation Commission is unable to assist you in obtaining your Master's Degree.

You have the right to appeal this decision. If you wish to appeal or if you have any questions, please contact me.

Sincerely,
/s/ Billy Floerke
Billy Floerke, Counselor
105 West Riverside Drive
Austin, Texas 78704

BF/jh

cc: file

Enclosures

Exhibit #4

THE NATIONAL CENTER FOR LAW AND THE DEAF LEGAL DEFENSE FUND

December 12, 1977

Lorene Rogers, President
The University of Texas at Austin
O. Henry Building
601 Colorado
Austin, Texas 78712

Dear Ms. Rogers:

We are writing to you on behalf of our client, Walter Camenisch, who is deaf, regarding the refusal of the University of Texas at Austin to provide him with interpreter services for his classes.

The regulation to Section 504 of the 1973 Rehabilitation Act provides that it is the responsibility of colleges and universities that receive federal financial assistance to make their programs accessible to qualified deaf students through the use of auxiliary aids, specifically including interpreter. Section 84.44(d) states:

> (d) Auxiliary Aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

(2) Auxiliary aids may include interpreters or other effective methods of making orally delivered materials available to students with hearing disabilities.

Two federal courts have ordered colleges and universities to provide interpreter services at the college's expense pursuant to the above regulation. I am enclosing a copy of the Opinion in *Barnes v. Converse College* and *Crawford v. University of North Carolina*. I am sure that after you read these opinions there will be no doubt that it is the responsibility of the University of Texas to provide Mr. Camenisch with a qualified interpreter for his classes.

Mr. Camenisch's schedules are as follows:

FALL: Ed. A. 382M 33640 3 Credit hours
Ed. A. 383 33665 3 " "

SPRING: Ed. A. 384G 33445 3 Credit hours
Ed. A. 383 33410 3 " "
Ed. A. 381 32780 3 " "

Please contact us within 10 days as to your position on this matter.

Very truly yours,

Marc P. Charmatz

MPC:es
Enc.
cc: Walter Camenisch
Ronald M. Brown, Vice President for Administrative Services
Claire Buie

Exhibit #5

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

December 21, 1977

Mr. Marc P. Charmatz
The National Center for Law
and the Deaf Legal Defense Fund
7th and Florida Avenues, N.E.
Washington, D.C. 20002

Dear Mr. Charmatz:

I am writing in response to your letter of December 12 and on behalf of President Rogers, who is ill. It is the University's position that there may be occasions when we would pay for an interpreter for a deaf student; however, we believe that responsible stewardship of public funds requires us to utilize the same tests of need as are used for other kinds of financial aid. These tests are the ones prescribed by the Department of Health, Education and Welfare for other programs of financial assistance. We believe that this position is consistent with both the letter and the spirit of the Federal regulations implementing Section 504 of the Rehabilitation Act of 1973.

Sincerely yours,

G. J. Fonken
Executive Assistant
to the President

GJF:pm

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

WALTER CAMENISCH,	)
	)
Plaintiff,	)
	)
v.	)
	)
CHARLES A. LeMAISTRE, et al.,	)
	)
Defendants.	)

MOTION FOR PRELIMINARY INJUNCTION

The plaintiff moves this Court for a preliminary injunction enjoining the defendants, their agents, employees, successors in office, and all persons acting in concert with them from refusing to provide interpreter services to plaintiff at the defendant University's expense. In support of said motion, plaintiff states that:

1. Plaintiff is currently holding the position of Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a master's degree, plaintiff has been appointed on an acting basis and is required, by the Texas School for the Deaf, to take courses in Educational Administration in order to obtain his master's degree. See Exhibit #1 to plaintiff's verified complaint.

2. In the summer of 1977, plaintiff requested that the University of Texas at Austin provide funds for the payment of an interpreter so that he could attend classes at that institution during the winter and spring semester. In a letter dated October 21, 1977, defendant Ronald M. Brown informed plaintiff that the University would not provide such funds. See Exhibit #2 to plaintiff's verified complaint.

3. Plaintiff submitted a similar request to the Texas Rehabilitation Commission. In a letter dated October 11, 1977, the Texas Rehabilitation Commission advised plaintiff that

the Commission would not provide plaintiff with funds for interpreter services. See Exhibit #3 to plaintiff's Verified Complaint.

4. Plaintiff, through his attorney, again requested that the University of Texas at Austin provide funds for interpreter services, in a letter dated December 12, 1977. See Exhibit #4 to plaintiff's Verified Complaint.

5. The December 21, 1977 response from the defendant University contained yet another refusal to provide the funds for interpreter services. See Exhibit #5 to plaintiff's Verified Complaint.

6. Defendant's refusal to provide interpreter services so that plaintiff can attend classes at the University of Texas at Austin violates plaintiff's constitutional and statutory rights.

7. Defendant's refusal to provide interpreter services for plaintiff has resulted in and will continue to result in irreparable injury to the plaintiff.

8. The issuance of such equitable relief herein will not cause undue loss to defendants but will prevent irreparable injury to plaintiff.

9. The public interest in securing equal educational opportunities for all, including the deaf, and having qualified deaf administrators and teachers at educational institutions for the deaf as mandated by Congress and the Department of Health, Education and Welfare, will be frustrated unless an injunction is issued.

WHEREFORE, plaintiff prays that this Court enter preliminary injunctive relief enjoining the defendants from refusing to provide interpreter services at the defendants' expense for the plaintiff so that he can take the courses which are necessary for his continued employment.

Respectfully submitted,
/s/ Marc P. Charmatz

Marc P. Charmatz
Sy DuBow
National Association of the Deaf
Legal Defense Fund
P.O. Box 1793
Washington, D.C. 20002
(2)2 547-0540

Charles Smith
812 San Antonio, Suite G-11
Austin, Texas 78701
(512) 472-9232

MEMORANDUM IN SUPPORT OF PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

OMITTED

APPENDIX "A" to Memorandum in Support of Plaintiffs Motion for Preliminary Injunction

(Other Attachments Omitted)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
ASSURANCE OF COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

The undersigned (hereinafter called the "recipient") HEREBY AGREES THAT it will comply with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C 794), all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto.

Pursuant to § 84.5(a) of the regulation [45 C.F.R. 84.5(a)], the recipient gives this Assurance in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts (except procurement contracts and contracts of insurance or guaranty), property, discounts, or other federal financial assistance extended by the Department of Health, Education, and Welfare after the date of this Assurance, including payments or other assistance made after such date on applications for federal financial assistance that were approved before such date. The recipient recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this Assurance and that the United States will have the right to enforce this Assurance through lawful means. This Assurance is binding on the recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this Assurance on behalf of the recipient.

This Assurance obligates the recipient for the period during which federal financial assistance is extended to it by the Department of Health, Education, and Welfare or, where the assistance is in the form of real or personal property, for the period provided for in § 84.5(b) of the regulation [45 C.F.R. 84.5(b)].

The recipient: [Check (a) or (b)]

a. ( ) employs fewer than fifteen persons;

b. (xx) employs fifteen or more persons and, pursuant to § 84.7(a) of the regulation [45 C.F.R. 84.7(a)], has designated the following person(s) to coordinate its efforts to comply with the HEW regulation:

Ronald M. Brown, Vice President for Administrative Services
P.O. Box 8179, University Station
Austin, Texas 78712
Name of Designee(s)—Type or Print

The University of Texas at Austin	Drawer T, University Station
Name of Recipient—Type or Print	Street Address or P.O. Box
746000203-W	Austin
(IRS) Employer Identification Number	City
	Texas 78712
	State Zip

I certify that the above information is complete and correct to the best of my knowledge.

20 July 1977
Date

/s/ Lorene L. Rogers
Signature and Title of Authorized Official
Lorene L. Rogers, President

If there has been a change in name or ownership within the last year, please PRINT the former name below:

NOTE: The 'A', 'B', and 'C' followed by numbers are for computer use. Please disregard.
PLEASE RETURN ORIGINAL TO: Office for Civil Rights, HEW, P.O. TEXAS AT AUSTIN, U OF, AUSTIN TX 78712

SUMMONS AND RETURNS

OMITTED

HEADING CAPTION OMITTED

MOTIONS TO DISMISS AND ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants The University of Texas and Charles A. LeMaistre, individually and in his official capacity as Chancellor of the University of Texas and Allan Shivers, individually and in his official capacity as Chairman of the Board of Regents of the University of Texas and Lorene Rogers, individually and in her official capacity as President of the University of Texas at Austin, and Robert Brown, individually and in his official capacity as Vice President for Administrative Services of the University of Texas at Austin, herein and file this their motions to dismiss under Rule 12(b), F.R.C.P. and original answer and in support thereof would show the Court the following:

MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT THEREOF

I.

Defendants respectfully move the Court to dismiss this cause of action for lack of jurisdiction on the grounds that the remedies for implementation of Section 504, of the Rehabilitation Act of 1973, are specifically set forth in the regulations promulgated thereunder and a private cause of action is not proper prior to the exhaustion of such remedies. Plaintiff has not alleged that any attempts to seek enforcement of this alleged complaint have been pursued through the administrative procedures set forth to provide such enforcement.

Plaintiff's cause of action is asserted to be one falling under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, prohibiting discrimination against handicapped persons by recipients of federal financial assistance. Following the passage of this statute, regulations were promulgated pursuant thereto which are found at Ti-

tle 45 Code of Federal Regulations, Subtitle A, Part 84 and may also be found at Volume 42 Federal Register, No. 86—Wednesday, May 4, 1977. The regulations promulgated pursuant to aid statute contain an elaborate administrative procedure whereby the Department of Health, Education and Welfare may take steps to implement the provisions of this statute or if no compliance is forthcoming, take steps to prevent the granting of federal assistance to the recipients covered by this statute and regulations. The authority of the federal government to promulgate such statute and regulations rests upon the granting of federal assistance to the recipients. The enforcement of such regulations is by a mechanism designed to deny federal assistance to recipients who fail to comply with the provisions of the regulations. In Appendix A—Analysis of Final Regulation, found at page 22685 of Vol. 42, Federal Register, No. 86, the purpose of these procedures is discussed at Subpart G in the following wording:

> "In Section 84.61, the Secretary has adopted the Title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department."

It is clear from the wording of this commentary that the implementation and enforcement of Section 504 is intended to be accomplished through the procedures set out in such regulation and not through a private cause of action in the federal courts. It would also appear that these regulations are intended to be implemented and enforced as are "all of the civil rights statutes and executive orders administered by the Department." One such statute which is analogous to Section 504 in that it is enforced through the denial of federal funds is Title IX of the Education Amendments of 1972. Federal courts have recently held that Title IX does not create a private cause of action, but rather is intended

to be enforced through the mechanisms set out to be followed by the Department of Health Education and Welfare. See *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir., 1976). The Court in *Cannon* recognized the principle that where no specific private cause of action is granted by a statute, the courts should not expand it to provide one, particularly where a scheme of administrative enforcement is contained in the statute. The Court cited the U.S. Supreme Court in *National Railroad Passenger Corp. (Amtrak) v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), stating:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." [citing *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929).]

It is important to note in this connection that the Seventh Circuit decision setting forth the right of a private cause of action under Section 504 of the Rehabilitation Act of 1973 was decided prior to the promulgation of effective enforcement regulations. The Court, in that opinion, *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (1977), specifically stated in a footnote at page 1286:

> We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under Sec-

tion 504 should be limited to *a posteriori* judicial review.

That decision was dated January 18, 1977. The regulations under Section 504 referred to above became effective June 3, 1977. With the promulgation of such regulations, the defendants contend any judicial cause of action would be proper only after the remedies provided for in such regulations have been exhausted. See also *Rogers v. Frito-Lay, Inc.*, 433 F. Supp 200 (N.D. Tx., 1977). It should be noted that *Lloyd* involved transportation and concerned other regulations in addition to those under Section 504. See also *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir., 1977) for a discussion of the effect of the transportation regulations which were at issue in *Lloyd* but are not at issue in this case.

II.

Defendants would respectfully move the Court, in the alternative, to dismiss this cause of action as to the University of Texas and all defendants in their respective official capacities as this cause of action is barred by the Eleventh Amendment to the Constitution of the United States as to the state defendants.

As urged above, Defendants contend that the plaintiff's cause of action is not one which can arise under Section 504 of the Rehabilitation Act of 1973, and, therefore, is not an action under which jurisdiction can be conferred over the State of Texas without violating the provisions of the Eleventh Amendment. A suit against a state agency, its political subdivisions and its officers, agents and employees acting in their official capacity is an action against the State of Texas, and as such is barred by the Eleventh Amendment to the Constitution of the United States absent consent to sue on behalf of the State or specific authority to file such suit under applicable federal statutes based upon constitutional provisions. No consent to sue the State has been pled by plaintiff, and defendants contend that the provisions of

Section 504 of the Rehabilitation Act of 1973 are not sufficient to grant a private cause of action against the State of Texas, its officers, agents or employees.

ORIGINAL ANSWER

Subject to the above and foregoing motions to dismiss under Rule 12(b), F.R.C.P., Defendants file this their original answer and in support thereof would show the Court the following:

III.

Defendants admit that the statutes and Constitutional Amendments cited in plaintiff's Verified Complaint, paragraphs 1, and 2 are statutes and amendments as cited, but deny that they grant any cause of action as to defendants.

IV.

Defendants deny the allegations in paragraph 3 of Verified Complaint.

V.

Defendants can neither admit nor deny the allegations of paragraph 4 of Verified Complaint.

VI.

Defendants deny that the University of Texas is a private institution as alleged in paragraph 5 of Verified Complaint and demand strict proof thereof; however, defendants admit that the University of Texas is a recipient of both federal and state assistance.

VII.

Defendants admit the allegations of paragraph 6, 7, 8 and 9 insofar as they correctly state the offices of the individuals named, but defendants deny that plaintiff has any cause of action against such individuals either individually or in their respective official capacities.

VIII.

Defendants can neither admit nor deny the allegations of paragraph 10 of Verified Complaint.

IX.

Defendants admit that the exhibits referred to in paragraphs 11, 12, 13 and 14 of Verified Complaint are attached to said complaint.

X.

Defendants admit that the Rehabilitation Act of 1973, Section 504, 29 U.S.C. Section 794 is a statute, and that 45 C.F.R. Section 84.44(d) contains regulations promulgated under such statute as alleged in paragraphs 15 and 16 of Verified Complaint, but deny that a cause of action exists under such statute or regulations as to Defendants and denies that the cited portion of that regulation is within the scope and authority of the Department of Health, Education and Welfare's authority to promulgate regulations under Section 504, 29 U.S.C. 794.

XI.

Defendants deny the allegations of paragraphs 17, 18 and 19 of Verified Complaint, and denies that plaintiff is entitled to any of the relief prayed for in said complaint.

XII.

Defendants deny all allegations of said Verified Complaint which have not been specifically admitted herein, or of which Defendants have specifically set forth their inability to admit or deny.

WHEREFORE, Defendants pray that their motions to dismiss be sustained, and alternatively, that plaintiff take nothing by his cause of action against them, that they have their costs, and for such other and further relief, both general and special, in law or equity, as to which defendants may show themselves justly entitled.

Signatures and Certificate of Service Omitted

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

OMITTED

STIPULATION OF FACTS

Plaintiff and the defendants hereby agree to stipulate to the following facts:

1. Plaintiff is a deaf man and is a graduate student at the University of Texas at Austin.
2. Defendant, University of Texas, is a state-supported institution of higher education which receives federal financial assistance from the United States.
3. Defendant Charles A. LeMaistre was Chancellor of the University of Texas at the inception of this suit.
4. Defendant Allan Shivers is Chairman of the Board of Regents of the University of Texas.
5. Defendant Lorene Rogers is President of the University of Texas at Austin.
6. Defendant Robert Brown is Vice-President for Administrative Affairs of the University of Texas at Austin.
7. Plaintiff is a handicapped individual, as defined in 29 U.S.C. Section 706 (6):

> . . . any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment or (c) is regarded as having such an impairment . . .

8. Plaintiff is a qualified handicapped individual, as defined in 45 C.F.R. Section 84.3(k) (3) of the HEW regulation to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794:

> . . . with respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

9. Plaintiff is employed at the Texas School for the Deaf at Austin, Texas. He earns a salary of approximately $11,100 per year. He is married and has no dependents. He and his wife together have a combined gross income in excess of $23,000.00 annually. He does not meet the University of Texas at Austin Office of Financial Aid established criteria for financial assistance to graduate students even when the expenses of the interpreter are added to his expenses for determining this criteria. His employment is contingent upon his supplementing his education. Plaintiff is taking courses at the University to obtain his master's degree and to become Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a Master's Degree, plaintiff has been appointed on an acting basis. If plaintiff does not have the services of a qualified interpreter, he will not be able to successfully participate in and complete the academic program and he will not be able to earn his Master's Degree and will lose his position as Acting Dean of Students. Plaintiff plans to take at least three hours of graduate courses in the summer of 1978, at the University of Texas.

10. Plaintiff is a deaf man who needs the services of a qualified interpreter in order to effectively participate in the educational program operated by the defendants. The term "qualified interpreter" means an interpreter who is able to simultaneously and accurately send and receive communication through sign language to a deaf person.

11. In the fall of 1977, plaintiff requested that the University of Texas at Austin provide funds for the payment of an interpreter so that he could attend classes at that institution. In a letter dated October 21, 1977, defendant, Ronald M. Brown, informed plaintiff that the University of Texas at Austin would not provide such funds (See attached Exhibit No. 1).

12. In a letter dated October 22, 1977, plaintiff again requested that the University of Texas at Austin provide funds for the payment of interpreters (See attached Exhibit No. 2).

13. Plaintiff submitted a similar request to the Texas Rehabilitation Commission which advised plaintiff that the Commission would not provide plaintiff with funds for interpreter services.

14. Plaintiff, through his attorney, again requested that the University of Texas provide funds for interpreter services in a letter dated December 12, 1977 (See attached Exhibit No. 3).

15. The December 21, 1977 letter from defendant University, contained yet another refusal to provide funds for interpreter services (See attached Exhibit No. 4).

16. Defendants to this date have not provided interpreter services to plaintiff, while he has been a student at said University in good standing. He paid $1245 for interpreter services for *9* courses at the University of Texas at Austin during his graduate studies.

17. Defendant Lorene L. Rogers, on behalf of the University of Texas at Austin, has signed and filed an Assurance of Compliance form, agreeing to comply with Section 504 of the Rehabilitation Act of 1973, as a condition to receiving federal financial assistance (see attached Exhibit No. 5).

18. University of Texas at Austin receives federal financial assistance in excess of $31,400,000. The budget of UTA for the year ending August 31, 1978, is in excess of *$200,000,000*.

Signatures Omitted

PLAINTIFF'S EXHIBIT #1

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

October 21, 1977

Walter Camenisch
4705 Trailcrest Circle
Austin, Texas 78735

Dear Mr. Camenisch:

It is my understanding that you have requested financial assistance for an interpreter for the deaf and that you have met with Mrs. Shirley Binder, Director of Student Financial Aid, in this regard. It is also my understanding that this request is related to your interpretation of Section 504 of the Rehabilitation Act of 1973, and I am writing you in my role as Coordinator of the University's implementation of those regulations.

We anticipate that there may be instances where The University of Texas at Austin will consider the possibility of providing individual services such as these when properly advised and they are not available from such agencies as the Texas Rehabilitation Commission or the Texas Commission for the Deaf. However, as a matter of policy we have determined that such assistance will be based on a reasonable interpretation of financial need on an individual basis, using guidelines already in effect for Federal and other financial assistance. Mrs. Binder informs me that you do not have financial need according to these guidelines, so we shall not provide this aid unless your circumstances change.

If you have further questions concerning your situation, you should feel free to contact Ms. Dora Savedra in the Office of the Dean of Students.

Sincerely,
/s/ Ronald M. Brown
Ronald M. Brown
Vice President for Administrative Services

RMB/mam

cc: Shirley Binder
Dora Savedra

PLAINTIFF'S EXHIBIT #2

Doris Sevedras
Dean of Students Office
Minority and Handicapped Student Services
Room 101
University of Texas
Austin

Dear Ms. Sevedras,

I am writing this letter to inform you of my meeting with Shirley Binder who is the Director of Financial Student Aids Office last week.

I am disappointed about the policy for providing the student aid for those students who earn less income than its total budget for a student to enter the University of Texas.

I think it is not fair since I spent so much money for my interpreter to help me understand my professors' lectures and all that in class. (I am deaf.) It is discriminating against the deaf people. The reason that I objected is that I have to pay my interpreter out of my pocket while normal hearing students do not have to worry about that.

It costs a lot of money and a lot of time in getting a good interpreter. I am very lucky to get an interpreter who will do at half of what is the usual cost for him to do. An interpreter who has the highest qualification and is certificated usually charges $7.50 an hour. It would cost me $600.00 to have an interpreter which is four times more than the cost of tuition for me to pay at the University.

I also have to pay some to make copies of taken notes that I borrow from the classmates. That would cost me about $40.00. It would not be possible for me to take notes and watch my interpreter at the same time since I can't hear.

There is a law Section 504 of the Rehabilitation Act. I got its quote from the law and it said no handicapped student may be denied access to necessary auxiliary educational aids.

I wish to express myself that I am a first-class taxpayer like all other normal hearing people. I don't get any exception like other handicapped people from paying income tax. I demand that the personnel at UT pay attention to my case.

Thank you for listening.

I hope to hear from you soon.

Sincerely,

Walter Camenisch
4705 Trail Crest Circle
Austin 78735

PLAINTIFF'S EXHIBIT # 3

THE NATIONAL CENTER FOR LAW AND THE DEAF LEGAL DEFENSE FUND

December 12, 1977

Lorene Rogers, President
The University of Texas at Austin
O. Henry Building
601 Colorado
Austin, Texas 78712

Dear Ms. Rogers:

We are writing to you on behalf of our client, Walter Camenisch, who is deaf, regarding the refusal of the University of Texas at Austin to provide him with interpreter services for his classes.

The regulation to Section 504 of the 1973 Rehabilitation Act provides that it is the responsibility of colleges and universities that receive federal financial assistance to make their programs accessible to qualified deaf students through the use of auxiliary aids, specifically including interpreter. Section 84.44(d) states:

> (d) Auxiliary Aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.
>
> (2) Auxiliary aids may include interpreters or other effective methods of making orally delivered materials available to students with hearing disabilities.

Two federal courts have ordered colleges and universities to provide interpreter services at the college's expense pursuant to the above regulation. I am enclosing a copy of the Opinion in *Barnes v. Converse College* and *Crawford v. University of North Carolina*. I am sure that after you read these opinions there will be no doubt that it is the responsibility of the University of Texas to provide Mr. Camenisch with a qualified interpreter for his classes.

Mr. Camenisch's schedules are as follows:

FALL:	Ed. A. 382M	33640	3	Credit hours
	Ed. A. 383	33665	3	" "
SPRING:	Ed. A. 384G	33445	3	Credit hours
	Ed. A. 383	33410	3	" "
	Ed. A. 381	32780	3	" "

Please contact us within 10 days as to your position on this matter.

Very truly yours,

Marc P. Charmatz

MPC:es
Enc.
cc: Walter Camenisch
Ronald M. Brown, Vice President for Administrative Services
Claire Buie

Plaintiff's Exhibit #4

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

December 21, 1977

Mr. Marc P. Charmatz
The National Center for Law
and the Deaf Legal Defense Fund
7th and Florida Avenues, N.E.
Washington, D. C. 20002

Dear Mr. Charmatz:

I am writing in response to your letter of December 12 and on behalf of President Rogers, who is ill. It is the University's position that there may be occasions when we would pay for an interpreter for a deaf student; however, we believe that responsible stewardship of public funds requires us to utilize the same tests of need as are used for other kinds of financial aid. These tests are the ones prescribed by the Department of Health, Education and Welfare for other programs of financial assistance. We believe that this position is consistent with both the letter and the spirit of the Federal regulations implementing Section 504 of the Rehabilitation Act of 1973.

Sincerely yours,

G. J. Fonken
Executive Assistant
to the President

GJF:pm

Plaintiff's Exhibit #5

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
ASSURANCE OF COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

The undersigned (hereinafter called the "recipient") HEREBY AGREES THAT it will comply with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto.

Pursuant to § 84.5(a) of the regulation [45 C.F.R. 84.5(a)], the recipient gives this Assurance in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts (except procurement contracts and contracts of insurance or guaranty), property, discounts, or other federal financial assistance extended by the Department of Health, Education, and Welfare after the date of this Assurance, including payments or other assistance made after such date on applications for federal financial assistance that were approved before such date. The recipient recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this Assurance and that the United States will have the right to enforce this Assurance through lawful means. This Assurance is binding on the recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this Assurance on behalf of the recipient.

This Assurance obligates the recipient for the period during which federal financial assistance is extended to it by the Department of Health, Education, and Welfare or, where the assistance is in the form of real or personal property, for the period provided for in § 84.5(b) of the regulation [45 C.F.R. 84.5(b)].

The recipient: [Check (a) or (b)]

a. ( ) employs fewer than fifteen persons;

b. (xx) employs fifteen or more persons and, pursuant to § 84.7(a) of the regulation [45 C.F.R. 84.7(a)], has designated the following person(s) to coordinate its efforts to comply with the HEW regulation:

Ronald M. Brown, Vice President for Administrative Services
P.O. Box 8179, University Station
Austin, Texas 78712
Name of Designee(s)—Type or Print

The University of Texas at Austin	Drawer T, University Station
Name of Recipient—Type or Print	Street Address or P.O. Box
746000203-W	Austin
(IRS) Employer Identification Number	City
	Texas 78712
	State Zip

I certify that the above information is complete and correct to the best of my knowledge.

20 July 1977	/s/Lorene L. Rogers
Date	Signature and Title of Authorized Official
	Lorene L. Rogers, President

If there has been a change in name or ownership within the last year, please PRINT the former name below:

NOTE: The 'A', 'B', and 'C' followed by numbers are for computer use. Please disregard.
PLEASE RETURN ORIGINAL TO: Office for Civil Rights, HEW, P.O. TEXAS AT AUSTIN, U OF, AUSTIN TX 78712

TRANSCRIPT OF HEARING ON PRELIMINARY INJUNCTION A-78-CA-0061

(Docket No. 21)

U.S. Court of Appeals #78-2191

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

WALTER CAMENISCH)
VS. (NO. A-78-CA-0061
THE UNIVERSITY OF TEXAS,)
ET AL

TRANSCRIPT OF HEARING ON PRELIMINARY INJUNCTION

APPEARANCES:

CHARLES SMITH, ESQUIRE and MARC P. CHARMATZ, ESQUIRE, and SY DuBOW, ESQUIRE
Appearing for Plaintiff;
THE ATTORNEY GENERAL OF TEXAS
By: Ms. Martha Allan, Asst.
Appearing for Defendant.

BE IT REMEMBERED that on the 11th day of May, 1978, in the Austin Division of the United States District Court, Western District of Texas, before THE HONORABLE JACK ROBERTS, judge of said court, the above numbered and styled cause came on for Hearing on Preliminary Injunction; whereupon, the following proceedings were had:

THE COURT: All right.

THE CLERK: The Court now calls A-78-CA-0061, Walter Camenisch versus The University of Texas and Charles LeMaistre, Allan Shivers, Lorene Rogers and Robert Brown, for Hearing on Preliminary Injunction.

MR. SMITH: The plaintiff is ready, your Honor. Charley Smith for the plaintiff. And I would ask the Court's permission for Marc Charmatz and Sy DuBow to appear in this cause. Mr. Charmatz is admitted to practice in the Federal District Courts in Maryland and before the Fourth Circuit. Mr. DuBow is authorized to practice before the U.S. District Courts in Virginia, Washington, D.C. and the Fourth Circuit and the U.S. Supreme Court.

THE COURT: Have you filed applications to be admitted to practice in the Western District of Texas?

MR. SMITH: No, your Honor, we haven't.

THE COURT: Well, if you come back down here very often you will have to file an application. For this case, you will be permitted to proceed.

MR. SMITH: Thank you, your Honor.

MR. CHARMATZ: Your Honor, may I approach the bench? Your Honor, for purposes of this case, I would like to introduce Miss Lil Browning and ask the Court that she be permitted to serve as the interpreter in this case.

THE COURT: All right.

MR. CHARMATZ: I believe, your Honor, there is no objection.

THE COURT: Do you want her sworn?

Ms. Allan: Yes, your Honor, we have no objection to stipulate as to her qualifications.

THE COURT: But, do you want her to be administered the oath?

Ms. Allan: Yes, your Honor.

THE COURT: All right. Come up here, please, ma'am, and raise your right hand and take the oath as the interpreter.

(the interpreter was duly sworn)

THE COURT: All right. Go ahead.

MR. CHARMATZ: Your Honor, plaintiff and defendant have entered into a Stipulation of Facts, which I would like to read into the record.

First: That the plaintiff is a deaf man and is a graduate student at the University of Texas at Austin.

Second: Defendant, University of Texas, is a State supported institution of higher education, which receives federal financial assistance from the United States.

Three: The defendant, Charles LeMaistre, is the Chancellor at the University of Texas at the inception of this suit.

Four: Defendant, Allan Shivers, is Chairman of the Board of Regents at the University of Texas.

Five: Defendant, Lorene Rogers, is President of the University of Texas at Austin.

Six: Defendant, Robert Brown, is Vice-president for administrative affairs of the University of Texas at Austin.

Seven: Plaintiff is a handicapped individual, as defined in 29 U.S.C., Section 706(6). Any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities (b) has a record of such an impairment or (c) is regarded as having such an impairment.

Eight: Plaintiff is a qualified handicapped individual as defined in 45 C.F.R., Section 84.3(k), (3) of the H.E.W. regulations, Section 504 of the rehabilitation act of 1973, 29 U.S.C., Section 794. And that is defined as: With respect to both secondary and vocational education services a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient education program or activity.

Nine: Plaintiff is employed at the Texas School for the Deaf at Austin, Texas. He earns a salary of approximately $11,100.00 per year. He is married and has no dependents. He and his wife together have a combined gross income of in excess of $23,000.00 annually. He does not meet the University of Texas at Austin's Office of Financial Aid established criteria for financial assistance to graduate students, even when the expenses of the interpreter are added to his expenses for determining this criteria. His employment is contingent upon his supplementing his education. Plaintiff is taking courses at the University to obtain his master's

degree and to become Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a master's degree, plaintiff has been appointed on an acting basis. If plaintiff does not have the services of a qualified interpreter, he will not be able to successfully participate in and complete the academic program, and he will not be able to earn his master's degree and will lose his position as acting Dean of Students. Plaintiff plans to take at least three hours of graduate courses in the Summer of 1978 at the University of Texas.

Ten: Plaintiff is a deaf man who needs the services of a qualified interpreter in order to effectively participate in the educational program operated by the defendant. The term "qualified interpreter" means an interpreter who is able to simultaneously and accurately send and receive communication through sign language to a deaf person.

Eleven: In the Fall of 1977, plaintiff requested the University of Texas at Austin to provide funds for the payment of an interpreter so that he could attend classes at that institution. In a letter dated October 21st, 1977 defendant, Ronald M. Brown, informed plaintiff that the University of Texas at Austin would not provide such funds: See attached, Exhibit No. 1.

Twelve: In a letter dated October 22nd, 1977 plaintiff again requested that the University of Texas at Austin provide funds for the payment of interpreters: See attached, Exhibit No. 2.

Thirteen: Plaintiff submitted a similar request to the Texas Rehabilitation Commission, which advised plaintiff that the Commission would not provide plaintiff with funds for interpreter services.

Fourteen: Plaintiff, through his attorney, again requested that the University of Texas provide funds for interpreter services in a letter dated December 12, 1977: See attached, Exhibit No. 3.

Fifteen: The December 21, 1977 letter from defendant university contained yet another refusal to provide funds for interpreter services: See attached, Exhibit No. 4.

Sixteen: Defendants to this date have not provided interpreter services to plaintiff, who has been a student at said university in good standing. He paid $1,245.00 for interpreter services for nine courses at the University of Texas at Austin during his graduate studies.

Seventeen: Defendant, Lorene L. Rogers, on behalf of the University of Texas at Austin, has signed and filed an Assurance of Compliance form, agreeing to comply with Section 504 of the Rehabilitation Act of 1973, as a condition to receiving federal financial assistance.

Eighteen: University of Texas at Austin receives federal financial assistance in excess of $31,400,000.00. The budget of the University of Texas at Austin, for the year ending August 31, 1978, is in excess of $200,000,000.00.

And, your Honor, that is our stipulation, and we ask the University to agree with that stipulation.

Ms. Allan: Defendants do agree to that stipulation, your Honor.

MR. CHARMATZ: Your Honor, we have one witness, which I would like to call now.

I would like to have the exhibits that are mentioned in the stipulation introduced. I previously referred to them; the letter of October 21st, 1977—

THE COURT: Have they been marked?

MR. CHARMATZ: Yes, sir.

THE COURT: All right.

MR. CHARMATZ: As Exhibit 1, the letter from Mr. Camenisch, dated October 22nd, 1977, and Exhibit 2—

THE COURT: Is there any objection to the exhibits?

Ms. Allan: Insofar as these are the exhibits to the Stipulation of Facts; is that correct?

MR. CHARMATZ: That is correct.

Ms. Allan: We have no objection, your Honor.

THE COURT: They will be admitted.

(said exhibits were admitted in evidence)

MR. CHARMATZ: I would like to call Mr. Camenisch to testify.

(witness was sworn through the interpreter)

WALTER CAMENISCH, testified through the interpreter, as follows:

DIRECT EXAMINATION QUESTIONS BY MR. CHARMATZ:

Q. Would you please state your name and address?

A. My name is Walter Camenisch, my address is 4705 Trail Crest Circle, Austin, Texas, 78735.

Q. And who is your employer?

A. I work at the Texas School for the Deaf.

Q. And what is your position at that school?

A. My duty is responsible for 18 house parents and about 80 children who live on the East Campus. I am supervisor —I supervise house parents and individuals in that position; I am responsible for schedules, evaluation, providing in-service training for them, and also I am responsible for 80 children after school. So, I have two recreation people to work with me, who make some plans for different activities, and also I have my assistant to the Dean of Students, who is responsible for children's trust funds and transportation, and also I have a secretary who takes care of all my phone calls and do all those extra jobs.

Q. Are you now enrolled in the University of Texas at Austin?

A. Yes.

Q. What services, if any, do you need to accommodate your hearing loss?

A. I really need a qualified interpreter and good note papers.

Q. Has the university ever assisted you in obtaining these services?

A. No.

Q. Why do you need an interpreter?

A. Because, really, it is difficult for deaf people to try to read lips—or to try to lip read. And you can't tell the professor to try to face you at all times, because most of the time the professor wants to move around, tries to write on the blackboard at the same time as he is talking, and I will not be part of the class. Like, for example, I may not be able to give my experiences or share some information with my classmates, because I cannot talk orally to the classmates. And I would not be able to ask the professor ques-

tions; that I really need an interpreter to help me get that kind of information from the professor. And some students may sit behind me and I am not able to read their lips because they are behind me. Some students may ask the professor some questions and I would miss a lot.

Q. Have you ever taken a course at the University of Texas without an interpreter?

A. Yes. I took one course way back in 1972, during the Summer. It was my first time to take a course at U.T. and I thought I could do without an interpreter, but I made a big mistake; that is the first time I got a "C." That is the only course where it resulted in a "C" grade. I remember one professor came to see me after that class, and the professor wanted me to pay attention to him; he felt that it was not right for me to be reading my book or writing while he lectured to the group, and I told him, "I can't help it, I don't have a skill to read your lips."

Q. And you are in the graduate school now. What would happen if you received a "C" grade in graduate school?

A. I understand that in graduate—that the graduate school requires all students to have a "B" or better grade; so if I made a "C", I might not get my master's degree.

Q. What plans do you have for the Summer, regarding enrollment in the University of Texas?

A. I plan to take one course this Summer. This course is called psychology of human learning, and I know that this course is going to require a lot of lectures, so I am going to have to need interpreters again.

MR. CHARMATZ: Your Honor, I have no other questions.

THE COURT: When is the time—deadline on the school starting on this course?

MR. CHARMATZ: Your Honor, I think Mr. Camenisch knows the answer to that question.

THE WITNESS: What was the question?

THE COURT: When is the deadline, timewise, for the beginning of the course?

THE WITNESS: I think June 6th—I think.

THE COURT: All right.

CROSS-EXAMINATION

QUESTIONS BY MS. ALLAN:

Q. Mr. Camenisch, during your graduate education, how many courses have you taken with an interpreter?

A. I took nine courses with an interpreter so far.

Q. Were you ever refused permission to have that interpreter in the classroom?

A. No. No, I always ask the professors if it is all right with them for me to have the interpreter in the classroom, and all of them have said, "Yes, it is okay."

Q. How many hours, semester hours, do you have to complete your master's degree?

A. Three hours.

Ms. Allan: I have no further questions.

MR. CHARMATZ: Your Honor, we ask the Court to take judicial notice of the statement in the Federal Register of Friday, February 17, 1978; we ask that it be marked as Plaintiff's Exhibit No. 6, which indicates that with respect to new complaints of the department of H.E.W. that—for new complaints for the fiscal year 1978—that 26 out of 756 complaints have been investigated by the department.

Ms. Allan: We have no objection, your Honor.

(Plaintiff's Exhibit 6 received)

MR. CHARMATZ: We would also ask that the Department of H.E.W. News, U.S. Department of Health, Education and Welfare, statement by Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, be admitted as Plaintiff's Exhibit No. 7

Ms. Allan: Your Honor, defendants do object to this as being irrelevant, as being less than the best evidence, since the regulations themselves are within the judicial knowledge of the Court and have been referred to in the pleadings of both parties, and as being hearsay and that we have no idea who actually wrote this document.

THE COURT: What is that instrument?

MR. CHARMATZ: It is the statement that Secretary Califano made at the time of the signing of the regulation. It is dated April 28, 1977 and it contains, as I said, the statement of Secretary Califano. It is published by the U.S.

Government printing office; it has the Health, Education and Welfare news insignia on the front.

THE COURT: It'll be admitted.

(said exhibit was admitted)

MR. CHARMATZ: Your Honor, that concludes the plaintiff's case.

THE COURT: Do you have any questions of the witness?

Ms. Allan: I have no further questions, your Honor. Thank you.

THE COURT: All right.

Ms. Allan: Your Honor, I am Martha Allan, of the Attorney General's office of the State of Texas, and represent the defendants in this case. We do not plan to call any witnesses, in view of the Stipulation of Facts, which has been entered into by the parties, and we will be ready to argue at such time as the Court desires.

THE COURT: Do you want to go forward with any statements at this time, any argument?

MR. CHARMATZ: Yes, your Honor.

THE COURT: Go ahead.

MR. CHARMATZ: Your Honor, this is a Motion for Preliminary Injunction, and I am sure the Court is very well aware of the First and Fifth Court standards for the issuance of a preliminary injunction.

The first standard is the substantial likelihood that the plaintiff will prevail on the merits. In this case, plaintiff certainly has a statutory right to have the regulation interpreted and to have the interpreter provided, as stated in section 84.44(d) of the regulation. That states that a recipient, to which this part applies, shall take such steps as are necessary to insure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to, discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids to students with impaired sensory, manual or speaking skills.

It goes on to state that interpreters are an example of an auxiliary aid. The stipulation 17 points out that the univer-

sity has, in fact, received some—has signed an Assurance of Compliance form, which means that they have agreed to be bound by this regulation, and that is the condition for their receiving in excess of $31,000,000.00, which is stated in the Stipulation of Fact, number 18. In similar instances, courts have granted, as a matter of preliminary relief, interpreters for deaf students.

For example, in the Crawford case, which we refer to in our brief, the Court stated: The Congress has inacted the rehabilitation act of 1973, and H.E.W. has formulated regulations which indicate that plaintiff has the right at sometime to receive that which he seeks in his complaint. And that compiaint, your Honor, we were seeking the services of an interpreter for the University of North Carolina, and also a very large public institution.

So, in this instance the first part of the four-part test, a substantial likelihood that plaintiff will prevail on the merits is more than a substantial likelihood, it is a high probability that that will be the case.

The next test is whether or not the plaintiff will suffer irreparable harm if an injunction is not granted, and in this case I refer to stipulation number nine and number ten. Number nine talks about the idea that Mr. Camenisch needs a qualified interpreter in order to successfully participate in and complete the academic program, and otherwise he will not be able to earn his master's degree and he will lose his position as acting Dean of Students. We can think of no more irreparable harm than the loss of a job.

And, as stated in the Barnes vs. Converse College case, the refusal to grant plaintiff relief at this time would defeat any rights she may have under the statutes and the regulation by failing to give a fact to plaintiff's rights would cause her immediate and irreparable injury in the form of loss of employment. And further, in the Crawford case, the plaintiff seeking a graduate education credit is of less pressing concern than in the Barnes case, because he was presently employed and was not in danger of losing his job. Therefore, in the Crawford case, where it was not as immediate and as irreparable as in this case, the Court, nevertheless, granted the preliminary relief.

In addition, one of the cases in the Fifth Circuit has held that it is often loosely stated that the purpose of a preliminary injunction is to preserve the status quo. It must not be thought, however, that there is any particular magic in the phrase "status quo." The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo is causing one of the parties irreparable injury, it is necessary to alter the situation to—so as to protect the injured either by returning to the last uncontested status quo between the parties or by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury.

The focus always must be on prevention of the injury by proper order, not merely on preservation of the status quo. Your Honor, that is in the Canal Authority, State of Florida versus Callaway case. In this instance, we feel that there is no adequate remedy at law, because in this instance if a preliminary injunction were not issued, Mr. Camenisch may not be able to receive any relief. If the case were to go to H.E.W. first, and no investigations were made, and as a result of one of the exhibits, Exhibit No. 6, that H.E.W. has indicated only 26 complaints would be investigated out of 756 that are estimated, he will not have his complaint investigated by the end of this Summer, and then it'll be questionable whether or not he would be able to recover any moneys after payment for interpreter services.

More importantly, in this instance, we feel the university has been in continual violation of the regulation since June 3rd of 1977, the date that the regulation took effect. And by the payment of $1,245.00 by Mr. Camenisch, that it has been in constant violation of the regulation, which we feel is very, very clear on that point.

So, without there being an adequate remedy at law at this time, we feel that the Court should grant the preliminary relief so as to protect Mr. Camenisch's rights, either

at some future day by the Court or by an H.E.W. investigation.

The third part of the four-part test on preliminary injunction is that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant. Your Honor, I don't think it takes much to know that the University of Texas is a very large university, receiving millions of dollars of federal financial assistance, and also having a budget in excess of $200,000,000.00. We have to look at that and look at Mr. Camenisch, who makes an income of $11,100.00 and has already expended, out of his own pocket, $1,245.00. In looking—or in balancing the harm, you have to look at the injury to the defendant to be the mere cost of one course during the Summer. With that we have to look at what Mr. Camenisch has already done, that is, the payment of $1,245.00. Certainly, when we balance the two, you can see that the Court—you can see that the University has gotten off very easy without having to pay any of this money. And that by not paying now, Mr. Camenisch, as we pointed out, may not be able to recover. The Crawford case points this out.

The Crawford case says: The Court has before it no information as to the amount of federal financial aid received by the University of North Carolina, nor whether the university has received separate funding for handicapped programs. Nevertheless, the courts has no doubt that the university would be better able to pay the cost.

Finally, your Honor, the last test for preliminary injunction is the test that the public interest demands that plaintiff's rights be protected by a preliminary injunction. Again, in the Crawford case, as the Court pointed out, moreover, in considering the final facts relevant in considering preliminary injunctive relief, the Court notes that public interest lies on the side of plaintiffs.

Congress has enacted the rehabilitation act of 1973 and H.E.W. has formulated regulations which indicate plaintiff has the right at sometime to receive that which he seeks in the complaint. While injunctive relief, in this particular case, does not preserve the status quo, the mandatory in-

junctive relief does serve to enforce the federal statutes and regulations under which plaintiff has a probable right to protection.

And, your Honor, finally we feel, in conclusion, we feel that the regulation is clear, the irreparable harm to the plaintiff is clear, the lack of any harm to the defendants is also clear. Secretary Califano—or in the Federal Register—points out something which I think is directly on point, and it is in the preamble to the regulation, and I think this is really the heart of the matter, it states: There is overwhelming evidence that in the past, many handicapped persons have been excluded from programs entirely, was denied equal treatment, simply because they are handicapped, but eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicap, making necessary in a number of context in order to insure equal opportunity.

Thus, for example, it is meaningless to admit a handicapped person in a wheelchair to a program if the program is only offered on the third floor of a walk-up building, nor is one providing equal educational opportunities to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instructions. These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from Section 504 or this regulation. Congress's mandate to end discrimination is clear.

Thank you, your Honor.

Ms. Allan: Your Honor, I will be as brief as possible. I believe that the main issues in this case, which deal with all the requisites for the granting of a preliminary injunction hinge upon the forum in which this case is brought.

This case is brought in a federal court, from which the pleadings in the case it is clear there has been no complaint

filed with the Secretary of Health, Education and Welfare. If the Secretary of Health, Education and Welfare were to promulgate these regulations, under the authority of this statute and the department which he heads does not choose to provide guidance as their interpretation, to provide relief for the class of people that is sought under that statute, then the Secretary of Health, Education and Welfare and that department should be the subjects of the lawsuit, not the University of Texas. It is, in fact, the regulation which is at issue and the interpretation of that regulation. The plaintiffs have cited the provision dealing with auxiliary aids, stating that a recipient to which this sub-part applies shall take such steps as are necessary to insure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under the education program or activity because of the absence of education auxiliary aids to students with impaired sensory, manual or speaking skills; it does not say the recipients shall provide. Surely if that was what was intended, that would have been a much less burdensome and much clearer way in which to express it.

Further, while it is true that as the plaintiffs state, that auxiliary aids, it is said, may include interpreters, following that statement is the statement: Recipients need not provide attendants individually prescribed devices, readers for personal use or study or other devices or services of a personal nature. The University of Texas, as is stipulated, is a State supported university; it has a responsibility to all its students and to those who support it. It must see that those funds which it administers are used to help those who need it the most. Consistent with that obligation, and consistent with the rules and regulations under this statute, the University of Texas has taken the necessary steps, as is shown in the Stipulation of Facts, to see that the handicapped student is not denied the benefits of his educational program.

It is stipulated that he did not meet their criteria for financial assistance; it is stipulated that he and his wife together have an income of over $23,000.00. The exhibits

attached to that Stipulation of Facts clearly indicate the position of the University of Texas, that consistent with their duties as the university and consistent with their duties and the spirit that these rules and regulations, they were seeking to make certain that they had taken whatever steps they could to see that this student had an interpreter. And in fact, as is stipulated, he did have an interpreter. He has testified that he was never denied the use of that interpreter in the classroom.

This injunction is not being brought to ask that the University of Texas allow this man to have an interpreter in the classroom; they have already done this. They have already taken whatever steps they could take to see that he had one. This injunction is being asked that the University provide that interpreter for the personal service to that student from funds from which it must spend moneys in its trust position as a State supported university. Because the university feels that this is a trust and because it would seek resolution of this in the forum where it should be resolved, that is, through the Secretary in the department which promulgated these rules and regulations, we would urge that in view of the fact that there has been no complaint filed with that department, in view of the fact that those regulations are not clear on their face and in view of the fact that there is, therefore, no showing that there is any jurisdiction in this court, or at this present time any probable cause of action, that the burden for preliminary injunctive relief cannot be met.

MR. DeBOW: Your Honor, since the defendants did not file any answer to our Motion for Preliminary Injunction, I just wanted to reply shortly to the points that she raised.

In particular, to bring to the Court's attention that the defendant raises that it is not the responsibility of the University to provide the interpreter services. And, in fact, the University has not taken any steps which are required under the regulation to make the classroom accessible. The burden has been borne, as the stipulation shows, by Mr. Camenisch. And I wish to point out to the Court, a recent Fourth Circuit Court decision of Davis versus Southeast-

ern Community College, handed down March 28th by the Fourth Circuit, where the Court stated that both the regulation, and specifically on auxiliary aid sections, and precedence supports the requirement of an affirmative conduct on the part of certain entities, under Section 504, even when such modifications become expensive. In that case it involved a hearing impaired nurse, and the Fourth Circuit Court said that the specific regulation we are talking about today, auxiliary aid, is an affirmative obligation that the college, the recipient, must provide and that expense is not a valid overriding consideration.

And we wish to also point out that when the University makes their buildings accessible by providing ramps, or making the building structure accessible to a wheelchair student, they do not request that handicapped students in a wheelchair to submit to a financial needs test, but they are asking that a deaf student participate in that same classroom also—they are requesting this person the added burden of submitting to a financial needs test. That is not fair, to submit one handicapped group, deaf people, to the financial needs test and not to wheelchair people, especially when the regulation is clear that schools, recipients of federal financial assistance, are to make all their facilities open and accessible to a deaf person; that means providing an interpreter in the classroom so they can understand what happens.

So, we also wish to point out that the question of not filing a complaint with the Office of Civil Rights has been raised by the defendant. It is well settled law, as we point out in our memorandum, that administrative remedies need not be sought if they are inadequate. And the O.C.R. plan, which we introduced, indicates that inadequacy.

Also, there are no emergency provisions within H.E.W. regulations, so that he cannot get the relief he needs by this Summer. And finally, plaintiff need not exhaust administrative remedies, for to do so would cause irreparable harm, as in the Martinez versus Richardson case of the Tenth Circuit, 472 federal second, 1121, pointed this out and said it is especially true where time is crucial to protect

the rights of the individual, and the administrative remedies would involve delay.

And we have here in stipulation nine that there is the irreparable harm that the defendant, Mr. Camenisch, if he cannot get interpreter services provided to him so he can successfully complete the course and get his master's degree and keep his position.

Many courts have recognized the private right of action, and that is cited in our memorandum. Four Circuit Courts of Appeal have already recognized a private right of action. The U.S. Government has recognized that a private right of action is a supplemental right that should be used.

And we would finally close by saying that in the Crawford decision they offered the plaintiff a preliminary injunction to protect the plaintiff's rights while telling him to file a complaint with H.E.W., but having the injunction to protect his rights in the future. And it was also pointed out in the Davis case by the Fourth Circuit, that the courts, if exhaustion is required, should give consideration to some preliminary injunction relief.

And finally, in Barnes, it is pointed out that the refusal to grant the plaintiff any relief at the time of the preliminary injunction hearing would defeat any right of the plaintiff; and that is equally clear here where we have a similar situation of loss of employment.

Thank you.

THE COURT: Is there anything further?

Ms. Allan: Nothing, your Honor, except I would like to answer one statement so that I will not create confusion.

The Motion to Dismiss and Answer, which I filed, was filed when I had received the injunction, and the Complaint and was filed in response to the injunction as well as to the Complaint.

THE COURT: This matter will be taken under advisement, and I will have something on it just as soon as I can.

(proceedings ended)

Reported Certificate Omitted

PLAINTIFF'S EXHIBIT 6

PLANNED COMPLAINT PROCESSING ACTIVITY— FY 1978

National Totals

Available Investigative Person Years 243.13

BASIS	Carryover Complaints			Backlog Complaints			New Complaints				
	Workload *1/*	Number to be Completed	Person Years	Workload *2/*	Number to be Investigated	Person Years	Projected FY 1978 Receipts	Person Years for Intake *3/*	Workload after Intake *4/*	Number to be Investigated	Person Years
RACE	652.2	601.7	66.18	261.5	21	3.29	1192	5.24	1048	45	7.05
SEX	1090.7	963.7	106.02	284.5	14	2.19	1141	5.02	1004	33	5.17
NATIONAL ORIGIN	171.5	161	17.70	71	6	.94	245	1.07	216	16	2.50
HANDICAP	112.6	101.6	11.18	453	14	2.20	756	3.31	664	26	4.07
TOTALS	2027	1828	201.08	1070	55	8.62	3334	14.64	2932	120	18.79

1. "Carryover complaints" means complaints in which the data and information gathering phase of the investigation began prior to 10/1/77.
2. "Packlog complaints" means complaints on hand as of 10/1/77 in which the data and information gathering phase of the investigation has not begun.
3. "Intake" means the initial review of incoming complaints, the acknowledgement, the determination of completeness and jurisdiction, and the completion of incomplete complaints.
4. Approximately 12% of all complaints received are outside the jurisdiction of OCR and are therefore eliminated from the complaint workload.

Federal Register, Vol. 43, No. 34—Friday, February 17, 1978

NOTICES

PLAINTIFF'S EXHIBIT 7

HEW NEWS
U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

CONTACT: PETER LIBASSI/DAN MARCUS
202/245-7741

FOR IMMEDIATE RELEASE
Thursday, April 28, 1977

Statement
by
Joseph A. Califano, Jr.
Secretary of Health, Education, and Welfare

For decades, handicapped Americans have been an oppressed and, all too often, a hidden minority, subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens.

Today I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans—the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps.

The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law.

The 504 Regulation will work fundamental changes in many facets of American life. In many cases this regulation calls for dramatic changes in the action and attitudes of in-

stitutions and individuals who are recipients of HEW funds. In implementing the unequivocal Congressional statute, this regulation opens a new era of civil rights in America.

For example, the regulation imposes the following requirements on recipients of HEW funds:

> All new facilities must be barrier-free, i.e., readily accessible to and useable by handicapped individuals.
>
> Programs or activities in existing facilities must be made accessible to the handicapped within 60 days, and, if no other alternatives—such as reassignment of classes or home visits—will achieve program accessibility, structural changes in the facilities must be made within three years. No exceptions to the program accessibility requirement will be allowed.
>
> Employers may not refuse to hire handicapped persons, if reasonable accommodations can be made by them to an individual's handicap and if the handicap does not impair the ability of the applicant or employer to do the specific job.
>
> Employers may not require pre-employment physical examinations and may not make a pre-employment inquiry about whether a person is handicapped, or the nature or severity of a handicap, although employers may make a pre-employment inquiry into an applicant's ability to perform job-related functions.
>
> Every handicapped child will be entitled to free public education appropriate to his or her individual needs, regardless of the nature or severity of the handicap. In those unusual cases where placement in a special residential setting is necessary, public authorities will be financially responsible for tuition, room and board.
>
> Handicapped children must not be segregated in the public schools, but must be educated with the non-handicapped in regular classrooms to the maximum extent possible.

Education institutions must undertake each year to identify and locate unserved handicapped children.

Colleges and universities must make reasonable modifications in academic requirements, where necessary, to ensure full educational opportunity for handicapped students.

Educational institutions and other social service programs must provide auxiliary aids, such as readers in school libraries or interpreters for the deaf, to ensure full participation of handicapped persons.

All recipients of HEW funds must complete within one year a self-evaluation process, in consultation with handicapped individuals and organizations, to determine which of their policies and practices need to be changed to assure equal opportunity for handicapped Americans.

The far-reaching changes wrought by the 504 Regulation are required by an act of Congress that broadly commands: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

This Act of Congress—the first major Federal law protecting the civil rights of handicapped persons—covers those individuals who have a physical or mental impairment which substantially limits a major life activity. In response to my request for guidance, Attorney General Griffin Bell, on April 12, 1977, issued a formal opinion stating, "It is our conclusion that alcoholics and drug addicts are 'handicapped individuals' for purposes of . . . Section 504."

The regulation promulgated today applies only to programs funded by the Department of Health, Education, and Welfare. But this regulation will be the basis for other similar regulations that will be issued by all other Federal departments and agencies and that will affect all recipients of federal funds.

This regulation not only bars recipients of HEW funds from unfairly excluding handicapped individuals, but it also requires positive steps to give handicapped citizens meaningful equality of opportunity in employment and in health, education and social service programs.

Discriminatory practices directed toward handicapped persons—just like those directed at racial minorities and women—are often deeply ingrained. We must recognize that positive steps will, in some instances, be required so that handicapped individuals are able to learn, to work, and to compete on a fair and equal basis. Admitting a deaf child to a class, for example, is a meaningless gesture unless an interpreter is also available to communicate the teacher's words.

The regulation issued today is built upon two and a half years of work by the HEW staff under the previous administration and three months of intensive study and review by me and a special task force which I created in February and which has been headed by Peter Libassi, the General Counsel-designate, and Arabella Martinez, the Assistant Secretary for Human Development.

Drafting a regulation has been a most difficult task because Section 504 prohibits discrimination against the handicapped in broad and unequivocal terms and yet the Congress enacted the Section without legislative hearings and with virtually no floor debate in either House. There is, thus, little Congressional guidance on the host of complex issues raised by Section 504's far-reaching prohibition against discrimination.

This lack of Congressional guidance doubtless contributed to my predecessor's decision not to sign a 504 regulation before he left office, despite the fact that the law had been in effect for 2½ years, but merely to send a draft regulation back to Capitol Hill in mid-January.

Shortly after assuming office, it was obvious to me that I could not sign a 504 Regulation without carefully reviewing the issues and determining that the regulation I would promulgate met the legitimate needs of handicapped individuals, conformed to the far-reaching intent of Congress,

as best we could discern it, and dealt forcefully, yet fairly, with recipients of Federal funds.

In recent weeks, either I or members of the Task Force have met seven times with organizations representing handicapped individuals. One of these meetings lasted two days and brought together 45 handicapped organizations and HEW program managers for the purpose of developing agency-by-agency compliance plans. During this same period, there have also been meetings with recipients of HEW funds, including educational organizations, health organizations, and representatives of mayors, governors and county executives.

During the course of our deliberations on the regulation, we have been able to shorten the previous draft of the regulation by at least 20 percent, largely by eliminating redundancies.

We have simplified and clarified that draft regulation so that it will be more understandable to handicapped individuals, HEW recipients and other interested parties, although any regulation requiring such major changes will, of necessity, retain some complexity.

We have also made revisions in the previous draft aimed at reducing red tape for all recipients, at allowing small recipients more flexibility in meeting the far-reaching objectives of the regulation, and in sharply reducing unnecessarily cumbersome notice requirements.

In sum, the regulation issued today reflects my best judgment of how Congress intended that the broad, uncompromising statutory command of Section 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly, with those recipients of Federal funds who will be subject to significant new requirements.

I am today sending to each member of the Congress the regulation as issued. I have asked each member to join with me in careful monitoring of the process by which Section 504 and this regulation are implemented. The power to illuminate further our national policy to end discrimination against the handicapped—and to instruct me as to whether

I have exceeded or fallen short of legislative intent—resides, of course, with the Congress.

Congress has another important role in making Section 504 a creative instrument for effecting needed change. It must carefully assess whether additional funds will be necessary if recipients are to comply promptly with the Congressional mandate and the regulation implementing that mandate. I will aggressively seek new federal monies under the Education for the Handicapped Act to help elementary and secondary schools meet their obligations.

I have asked David Tatel, the new Director of the Office for Civil Rights, and Arabella Martinez, Assistant Secretary for Human Development, to establish a special technical assistance unit, calling upon all the skills available throughout the Department, in order to help HEW recipients comply with this regulation. I will seek whatever additional funds are necessary to make certain that we have adequate resources to provide such technical assistance.

The 504 Regulation today becomes the law of the land, and it is critically important that we obey that law and make these new rules a reality for handicapped Americans.

In implementing the regulation, I pledge that HEW will move promptly and firmly but I also pledge that we will be guided by sensitivity, fairness and common sense.

I ask today that all parties affected by this regulation also be guided by those qualities as we begin the arduous process of implementation—a process which will no doubt be controversial.

For example, implementing the Congressional determination that drug addicts and alcoholics are covered by Section 504 will require special sensitivity, fairness and common sense. We must recognize, on the one hand, that the law says it is unjust to discriminate against individuals simply because they suffer from the disease of addiction or alcoholism. But the regulation clearly contemplates that recipients of federal funds can make decisions on the basis of an individual's behavior caused by such diseases.

As the Attorney General's opinion concludes: ". . . the statute does not require the impossible. It does not unre-

alistically require the recipients of Federal contracts and grants to ignore all the behavioral or other problems that may accompany a person's alcoholism or drug addiction if they interfere with the performance of his job or his effective participation in a federally assisted program."

Section 504 and this regulation constitute a striking recognition of the civil rights of America's handicapped citizens, just as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and their companion regulations, are critical elements in the structure of law protecting the civil rights of racial minorities and women.

In Section 504, the Congress enacted a charter of equality to help end the shameful national neglect of handicapped individuals and to translate many of their legitimate needs into legal rights.

MEMORANDUM OPINION AND ORDER
(of the District Court)
Reproduced in PETITION FOR WRIT OF CERTIORARI

JUDGMENT
(of the District Court)
Reproduced in PETITION FOR WRIT OF CERTIORARI

NOTICE OF APPEAL
OMITTED

ORDER DENYING APPLICATION FOR STAY
OMITTED

Preliminary
Injunction Undertaking

Caption Omitted

Walter Camenish, the Plaintiff, and National Surety Corporation surety, submitting ourselves to the jurisdiction of the Court, hereby undertake for ourselves and each of us, our and each of our heirs, executors, administrators, successors, and assigns, to make good to the defendants all damages not to exceed the sum of Three Thousand and No/100 Dollars ($3,000.00) by _____ suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the Court shall direct, and that, on dissolving the injunction, the Court may give judgment thereon against the principal and surety for said damages in the decree dissolving the injunction, or in a further decree after ascertainment of the amount of said damages.

Walter Camenish /s/
Walter Camenish

NATIONAL
SURETY
CORPORATION
James E. Abney /s/
James E. Abney,
Attorney-in-Fact

APPROVED: *June 6 /s/, 1978*
Jack Roberts /s/, Judge

NATIONAL SURETY CORPORATION

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of Illinois, and having its Home Office in the City of Chicago, Illinois, has made, constituted and appointed, and does by these presents make, constitute and appoint JAMES E. ABNEY, AUSTIN, TEXAS, its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, seal, acknowledge and deliver any and all bonds, undertakings, recognizances or other written obligations in the nature thereof and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises.

This power of attorney is granted pursuant to Article VIII, Section 29 and 30 of By-laws of NATIONAL SURETY CORPORATION now in full force and effect.

> "Article VIII. *Appointment and Authority of Resident Assistant Secretaries, and Attorney-in-Fact and Agents to accept Legal Process and Make Appearances.*
>
> Section 29. *Appointment.* The Chairman of the Board of Directors, the President, any Vice-President or any other person authorized by the Board of Directors, the Chairman of the Board of Directors, the President or any Vice-President, may, from time to time, appoint Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Company and Agents to accept legal process and make appearances for and on behalf of the Company.

Section 30. *Authority.* The Authority of such Resident Assistant Secretaries, Attorneys-in-Fact, and Agents shall be as prescribed in the instrument evidencing their appointment, and any such appointment and all authority granted thereby may be revoked at any time by the Board of Directors or by any person empowered to make such appointment.

This power of attorney is signed and sealed under and by the authority of the following Resolution adopted by the Board of Directors of NATIONAL SURETY CORPORATION at a meeting duly called and held on the 7th day of September, 1972, and that said Resolution has not been amended or repealed:

"RESOLVED, that the signature of any Vice-President, Assistant Secretary, and Resident Assistant Secretary of this Corporation, and the seal of this Corporation may be affixed or printed on any power of attorney, on any revocation of any power of attorney, or on any certificate relating thereto, by facsimile, and any power of attorney, any revocation of any power of attorney, or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Corporation."

IN WITNESS WHEREOF, NATIONAL SURETY CORPORATION has caused these presents to be signed by its Vice-President, and its corporate seal to be hereunto affixed this 6th day of June, 1977.

NATIONAL SURETY CORPORATION
By /s/ William W. Lauber
Vice-President

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO ss.

On this 6th day of June, 1977, before me personally came William W. Lauber to me known, who, being by me duly sworn, did depose and say: that he is Vice-President of NATIONAL SURETY CORPORATION, the Corporation

described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year herein first above written.

/s/ Susie K. Gilbert
Notary Public
CERTIFICATE
OFFICIAL SEAL
SUSIE K. GILBERT
NOTARY PUBLIC–CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Nov. 19, 1980

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO

I, the undersigned, Assistant Secretary of NATIONAL SURETY CORPORATION, an Illinois Corporation, DO HEREBY CERTIFY that the foregoing and attached POWER OF ATTORNEY remains in full force and has not been revoked; and furthermore that Article VIII, Sections 29 and 30 of the By-laws of the Corporation, and the Resolution of the Board of Directors, set forth in the Power of Attorney, are now in force.

Signed and sealed at the City and County of San Francisco. Dated the *5th* day of *June, 1978*.

Jeffrey S. Wilson /s/
Assistant Secretary

COMPLAINT ON BEHALF OF WALTER CAMENISCH (To HEW)

OMITTED

Caption Omitted

PLAINTIFF'S FIRST INTERROGATORIES

Plaintiffs request that the Defendants upon whom these interrogatories are served, by an officer or agent who shall furnish such information as is available to said Defendants, answer the following interrogatories separately and fully in writing and under oath, pursuant to Rule 33 of the Fed. R. Civ. P., and that said answers be signed by the person making them and be served on the undersigned attorneys for Plaintiffs, within thirty (30) days after the service of these interrogatories or within such other time as is ordered by the Court.

PRELIMINARY STATEMENT

1. In answering these Interrogatories, furnish all information which is available to you, including information in the possession of your assignors, assignees, agents, employees, representatives and all others from whom you may freely obtain it as well as from your attorneys and their investigators. Where the answers are based on statements of others and do not represent your personal knowledge, explicitly so indicate, naming the person or persons relied upon.

2. If you cannot answer any one, or any sub-part, of these Interrogatories in full, after exercising due diligence to secure the information to do so, explicitly so state. Answer every other Interrogatory and sub-part, and give any information in your possession which may partially answer the Interrogatory or sub-part which you cannot answer in full, or which may lead to Plaintiffs' discovering the answer thereto.

3. The term "in writing" as used herein means all memorializations, whether written, photographic, tape-recorded or otherwise. It includes all business or other records, reports, papers, documents, photographs, books, letters, notes, memoranda, tape recordings, or any other corre-

spondence, whether in your possession or under your control or not, relation to or pertaining in any way to the subject matter in connection with which it is used. It includes without limitation all file copies and all drafts prepared in connection with such writings whether used or not.

4. A request that a "writing" be identified or described calls for the following information concerning it:

a. Its nature, e.g., letter, memorandum, contract, report, record, photograph, tape recording, etc.;
b. Its title, if any;
c. The date it was sent;
d. The date it was received;
e. The identity of the person sending it;
f. The identity of the person or persons who prepared it or participated in its preparation in any way or signed it;
g. A brief summary or description of its contents;
h. Whether Defendant and/or attorney will voluntarily make said writing available to Plaintiffs' attorneys;
i. Please state the name and address of the present custodian of each such record, account or writing and the location in which each is presently kept; or in the alternative, attach copies of each said record, account or writing to your answers to these interrogatories.

5. As to each party, person, or individual mentioned or referred to in an answer to any Interrogatory, state his name, his address, and his last known occupation and employment or business or professional affiliation.

6. These Interrogatories are to be deemed continuing and the Defendants are under a duty to supplement their answers hereto from time to time as new or further facts come into possession.

INTERROGATORIES

1. How many handicapped students are enrolled in the University of Texas at each of its campuses?

2. How many hearing-impaired students are enrolled in the University of Texas at each of its campuses?

3. Have any of the handicapped students enrolled in the University of Texas system requested auxiliary aids from the University? If so, what aids were requested?

4. If the University of Texas has provided interpreters for deaf students in the years 1977 and 1978, please state:

   a. Name of the students;
   b. The cost of providing the aid;
   c. Whether the University bore the cost of providing the aid.

5. If the University of Texas has provided readers for blind students in the years 1977 and 1978, please state:

   a. Name of the student;
   b. The cost of providing the aid;
   c. Whether the University bore the cost of providing the aid.

6. Please state the exact text of any rule which states that hearing-impaired students shall not be provided with an interpreter which is necessary in order for that student to effectively participate in a University program. Alternatively, please attach a copy of this rule.

7. State in dollars and cents the total amount of federal financial assistance received directly or indirectly by the University of Texas at each of its campuses during the 1977 and 1978 school years.

8. State in dollars and cents the total amount of federal financial assistance received directly or indirectly by the University of Texas at each of its campuses to provide auxiliary aids for blind students during the 1977 and 1978 school years.

9. State in dollars and cents the total amount of federal financial assistance received directly or indirectly by the University of Texas at each of its campuses during the 1977 and 1978 school years to remove architectural barriers.

10. Has the University of Texas received any other financial assistance or grants to provide services for handicapped students at the University. If so, state:

a. Source of the financial assistance or grant;
b. Amount of the financial assistance or grant;
c. Services to be provided by financial assistance and each grant;
d. Types of handicaps to which services were provided.

11. Please state the name, address, occupation and affiliation with defendants of the person answering or verifying the answers to these Interrogatives.

Signatures and Certificate Omitted

Caption Omitted

OBJECTIONS TO INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants have been served with Interrogatories by Plaintiff and respectfully object to such interrogatories and move the Court to excuse the filing of answers to such at the present time for the following reasons:

I.

This Honorable Court entered its Injunctive Order in the above styled cause on the 17th day of May 1978. In addition to granting the injunctive relief sought by Plaintiff, the Court's order required the filing of a bond and the filing of a complaint with the Department of HEW and stayed further proceedings "pending a final administrative determination on the merits." The Court subsequently entered a preliminary docket control order for discovery to begin immediately; however, Defendant believes that such docket control order was entered under the assumption that there would have been a final administrative determination by the time discovery was begun. The Department of HEW has not issued its findings in this case and Defendants therefore object to the interrogatories propounded by Plaintiff on the grounds that such interrogatories are not in order until after the exhaustion of administrative remedies in this case and are not in accord with the Court's Order of May 17, 1978 staying these proceedings. Defendants would further show that an appeal of the injunctive order has been filed in the Fifth Circuit raising the jurisdictional issues involved in Section 504 and a decision by the Fifth Circuit could obviate the need for further discovery in this cause.

II.

Defendants further object to interrogatories 1, 2, 3, 4, 5, 7, 8, 9 and 10 in that those interrogatories seek information which is not relevant to a party to this lawsuit. Such inter-

rogatories seek information which might possibly be relevant in a class action but can have no relevance to Mr. Camenisch's lawsuit which does not seek relief for anyone but himself. In particular, Defendants object to furnishing information concerning activities at all of the University of Texas System's campuses as plaintiff was only enrolled in and seeking relief from the University of Texas at Austin.

WHEREFORE, Defendants ask this Court to set a hearing on Defendant's Objections to Interrogatories and at the conclusion of such to stay discovery proceedings in this cause pending an administrative determination on the merits, or in the alternative, to excuse Defendants from answering Interrogatories 1, 2, 3, 4, 5, 7, 8, 9 and 10 in their entirety or alternatively to excuse Defendant from answering such interrogatories as to any campus other than the University of Texas at Austin.

Signatures and Certificate of Service Omitted

ORDER EXTENDING TIME FOR TRANSMITTING RECORD ON APPEAL

OMITTED

No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 25, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-317

THE UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Walter Camenisch, Respondent, respectfully prays that this Court deny Petitioners' Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 28, 1980.

STATEMENT OF THE CASE

Petitioners seek review of a preliminary injunction order in a case brought by a deaf man, Walter Camenisch, against the University of Texas. Mr. Camenisch challenged the University's refusal to provide an interpreter for his classes. He based his claim on both Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

At the time he filed the suit, Mr. Camenisch was a graduate student at the University of Texas at Austin and was employed as Acting Dean of Students at the Texas School for the Deaf. Because his job was contingent upon supplementing his education, Mr. Camenisch enrolled in the University's Master's Degree program in education. Petitioners agreed that he needed the assistance of a qualified sign language interpreter in order to participate in and benefit from this academic program.

Faced with the prospect of losing his job if he could not pass these courses, Mr. Camenisch sought preliminary relief. The University moved to dismiss on the jurisdictional ground that there is no private right of action under Section 504. This argument was rejected by the District Court, which issued a preliminary injunction, ordering the University to provide an interpreter. As a condition to preliminary relief, the District Court ordered Mr. Camenisch to post a $3,000 security bond and to file an administrative complaint with the Department of Health, Education, and Welfare (HEW).

The Fifth Circuit Court of Appeals upheld the preliminary injunction order, finding no abuse of discretion by the District Court. The Court of Appeals also vacated that part of the order requiring the filing of an administrative complaint and sent the case back to the District Court for a final determination of Mr. Camenisch's claim. Motion for rehearing en banc was denied.

I. PETITION FOR CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A PRELIMINARY INJUNCTION ORDER

There has been no final decision on the merits of Walter Camenisch's claim that the University should provide an interpreter for his classes. The District Court only ordered preliminary relief "to preserve any

rights [Plaintiff] *may have* under the statute and [to prevent] immediate and irreparable harm." Petition for Writ of Certiorari, p. A-21 (emphasis added). Since the District Court's order was not final, the petition for writ of certiorari should be denied. As this Court stated in *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), lack of finality "of itself alone furnished sufficient ground for the denial."

Petitioners, in fact, conceded in their Brief to the Fifth Circuit that the issue of whether the University should provide interpreter services was not "presently before the Court in view of the fact that there has been no determination made by the Court below that such services are mandated by the regulations." *See* Appendix attached hereto. Petitioners only addressed the private right of action issue in their Brief to the Fifth Circuit.

Thus, as Petitioners recognized, the District Court should be given the opportunity to decide the merits of the case. In the interest of judicial economy, "the Supreme Court will not usually grant certiorari to review a non-final judgment such as . . . one sanctioning the issuance or denial of a preliminary injunction, in the absence of exceptional circumstances." R. Stern and E. Gressman, *Supreme Court Practice*, § 4.19 at 300 (5th ed. 1978). *See, e.g., Roe* v. *Doe*, 420 U.S. 307 (1975). There are no "exceptional circumstances" warranting review at this stage, since Petitioners were fully protected by the $3,000 security bond posted by Mr. Camenisch pending the final outcome of the litigation. As the order appealed from is not final, "it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967).

II. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

The Fifth Circuit's holding was fully supported by the record and judicial precedent.* Judge Tuttle began by stating that, "appellate review of such orders is limited to an examination of whether the District Court abused its discretion." 616 F.2d at 130. In light of this restricted standard of review, the Fifth Circuit's holding that the District Court exercised sound discretion is not of sufficient importance to warrant the granting of certiorari. Rule 17 of Rules of the Supreme Court of the United States. *See, e.g., Bayless* v. *Martine*, 430 F.2d 873 (5th Cir. 1970), *cert. denied*, 406 U.S. 930 (1972).

Respondent notes that Petitioners have erroneously attempted to characterize the instant case as inconsistent with this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). The Fifth Circuit properly noted the obvious differences between *Southeastern Community College* and the present case. In the former case, this Court held that Mrs. Davis failed to meet the legitimate and necessary physical requirements of the college's nursing program, and hence was not an "otherwise qualified handicapped individual" within the meaning of Section 504. 442 U.S. at 407. This Court further found that none of the modifications and auxiliary aids authorized by the HEW Regulations could accommodate Mrs. Davis's handicap to enable her to participate

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* Three other federal district courts, faced with virtually identical situations, also issued preliminary injunctions to prevent irreparable harm to deaf college students. See, Barnes v. Converse College, 436 F. Supp. 635 (D. S.C. 1977); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D. N.C. 1977); Herbold v. The Trustees of the California State Universities and Colleges, C-78-1358-RHS (N.D. Ca. July 17, 1978).

in the program and become a registered nurse. 442 U.S. at 409.

By stark contrast, Petitioners stipulated that Walter Camenisch was an otherwise qualified handicapped student who could participate successfully in his classroom activities with an interpreter. The Court of Appeals recognized that, unlike Mrs. Davis, Mr. Camenisch could realize the principal benefits of this academic program and perform well in his profession as Dean of Students at the Texas School for the Deaf, in spite of his handicap.

Petitioners dispute Judge Tuttle's conclusion that *Southeastern Community College* "was clearly not intended to bar relief for all handicapped people in the future." 616 F.2d at 132. However, that conclusion was based squarely on this Court's recognition that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." *Southeastern Community College*, 442 U.S. at 412-413.

Moreover, Judge Tuttle's citation to the HEW Regulation requiring the provision of interpreters was founded upon this Court's statement in *Southeastern Community College* that "identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." 442 U.S. at 413.

Thus, the significant factual distinctions between the two cases as well as the language of *Southeastern Community College* firmly support the Fifth Circuit's limited holding that Walter Camenisch's claim has a "probability" of success on the merits. Final determination of the merits of his claim should await a full trial.

III. THERE IS NO CONFLICT IN THE CIRCUITS ON THE PRIVATE RIGHT OF ACTION ISSUE

The Fifth Circuit held that Mr. Camenisch can maintain a private right of action under Section 504. As there is no conflict in the circuits on this issue, the petition for writ of certiorari should be denied.

The Fifth Circuit's holding is consistent with the decisions of every other court of appeals that has confronted the issue. *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977); *NAACP* v. *Medical Ctr., Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis* v. *Southeastern Comm. College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979).

Moreover, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court found a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Because Section 504 was patterned after and is almost identical to Title IX, several courts have applied the same reasoning used in *Cannon* to Section 504. *See, e.g.*, *NAACP* v. *Medical Ctr., Inc.*, 599 F.2d at 1249, 1255-1258; *Rogers* v. *Frito-Lay, Inc., and Moon* v. *Roadway Express*, 611 F.2d 1074 (5th Cir. 1980), *cert. filed*, Nos. 79-1809 & 1810 (May 14, 1980); *Hart* v. *County of Alameda*, 485 F. Supp. 66 (N.D. Ca. 1979); *Larry P.* v. *Riles*, 3 EHLR 551: 295 (N.D. Ca. 1979); *Medley* v. *Ginsberg*, No. 78-2099-CH (S.D. W. Va. June 10, 1980).

Petitioners contend that the Fifth Circuit's finding of no private right of action under Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, in *Rogers*, conflicts with its holding with respect to Section 504 in the present case. However, the Fifth Circuit in *Rogers*, relying upon *Cannon*, expressly pointed out the distinct differences

between the two statutes and noted that a private right of action exists under Section 504. 611 F.2d at 1083. Indeed, the Fifth Circuit en banc saw no conflict between the two decisions when it refused to rehear the *Camenisch* case.

Petitioners also contend that the decisions in *Trageser* v. *Libbie Rehab. Ctr., Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), and *Carmi* v. *Metropolitan St. Louis Sewer Dist*, 620 F.2d 672 (8th Cir. 1980), *cert. filed*, No. 80-59 (July 14, 1980), warrant the granting of certiorari in the present case. Both of those cases, however, involved an issue which simply does not exist here—whether employment discrimination is included within the scope of activities covered by Section 504. In fact, the *Trageser* court noted the private litigant's right to bring a postsecondary education suit under Section 504. 590 F.2d at 90, n.12.

IV. THE ISSUE OF WHETHER SECTION 504 APPLIES ONLY TO THE SPECIFIC PROGRAMS THAT RECEIVE FEDERAL FINANCIAL ASSISTANCE WAS NEVER RAISED IN THE COURTS BELOW AND IS NOT PROPERLY BEFORE THIS COURT

Petitioners admitted in their Answer to the Verified Complaint that the University of Texas is a recipient of federal financial assistance. They later stipulated that the University receives in excess of $31,400,000 in federal funds and has signed an Assurance of Compliance Form, agreeing to comply with the HEW 504 Regulations.

Petitioners now ask this Court to resolve the issue of whether Section 504 applies only to the specific programs that receive federal aid. This issue was never raised, never pleaded as a defense, and never briefed or argued before the courts below. This Court has consistently refused to consider issues which have not been raised,

pleaded, or argued in either the district court or the court of appeals. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295, n. 5 (1970).

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons set out above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marc P. Charmatz, do hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States mail, certified, return receipt requested, to the following attorney of record for Petitioner: Lonny F. Zwiener, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 25th day of September, 1980.

MARC P. CHARMATZ

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2191

WALTER CAMENISCH,
Plaintiff-Appellee,
v.
THE UNIVERSITY OF TEXAS, *et al.*,
Defendants-Appellants.

From The United States District Court
For The Western District of Texas
Austin Division

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* * * *

ARGUMENT AND AUTHORITIES

The Defendants contend that the District Court should have dismissed this cause of action as the Court lacks jurisdiction to hear it and/or to grant any preliminary relief until the Department of Health, Education and Welfare has had full opportunity to make the administrative judgments required by the Regulations promulgated by the Secretary of Health, Education and Welfare found at 45 C.F.R., Part 84 and 42 Federal Register, Wednesday, May 4, 1977, Part IV at pages 22676 through 22702. In view of the fact that the trial court based its order solely on statutory grounds, this brief will not deal with the constitutional issues which might be raised by Plaintiff's Fourteenth Amendment claims in the Court below; nor will the constitutional jurisdictional questions with respect to the Eleventh Amendment be discussed in this brief as this appeal relates only to the propriety of the preliminary injunctive relief granted by the Court below. Further, this brief will not address the question of whether or not the promulgated regulations would exceed the scope of the statute if they were to require colleges to provide interpreter services. Defendants contend that this would be the case, but do not believe that issue is presently before the Court in view of the fact that there has been no determination made by the Court below that such services are mandated by the regulations.

* * * *

NO. 80-317

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners

V.

WALTER CAMENISCH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The principle questions presented for review are:

1. Whether the Court of Appeals misconstrued this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), so as to require that The University of Texas provide auxiliary services and affirmative action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and assume the financial and administrative burdens of furnishing a sign language interpreter for a deaf graduate student to assist him in his classroom work.

2. Whether the Court of Appeals correctly held that Section 504 of the Rehabilitation Act of 1973 confers a private cause of action in favor of handicapped persons.

3. Whether, assuming arguendo that Section 504 requires auxiliary services and affirmative action which impose a financial burden on an institution of higher education and further that Section 504 confers a private cause of action in favor of the handicapped, the handicapped plaintiff must show that the financial assistance received by the institution was intended to support the particular "program" in which the handicapped plaintiff is enrolled or engaged.

PARTIES TO THE PROCEEDING

In the District Court below, Walter Camenisch, as Plaintiff, brought suit against:

The University of Texas;

Charles A. LeMaistre, individually and in his official capacity as Chancellor of the University of Texas;

Allan Shivers, individually and in his official capacity as Chairman of the Board of Regents of the University of Texas;

Lorene Rogers, individually and in her official capacity as President of the University of Texas at Austin; and

Robert Brown, individually and in his official capacity as Vice President for Administrative Services of the University of Texas at Austin.

All of the individuals no longer serve in the capacities described. However, The University of Texas is the real party at interest and no defect as to parties is alleged by Petitioners.

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NO. 80-317

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.
Petitioners

V.

WALTER CAMENISCH,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at 616 F.2d 127. A copy of the opinion is also included in the Appendix to the Petition. The District Court opinion is not reported but is included in the Appendix to the Petition together with the District Court's judgment. The judgment of the Fifth Circuit and its order denying rehearing is also set out in the Appendix. (The denial of rehearing is reported at 618 F.2d 1389).

JURISDICTION

The opinion of the Court of Appeals was entered on April 28, 1980. Petitioners' Petition for Rehearing, which was timely filed, was overruled by the Court of Appeals on May 29, 1980. Petition for Certiorari was timely filed on August 25, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1234(1). The Petition was granted on November 3, 1980.

STATUTE INVOLVED

The statute in question in this case is Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; the statute originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(6)(29 U.S.C. §706[6]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for nondiscrimination by federal agencies and, after amendment, now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7)(29 U.S.C. §706[7]), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the

amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

STATEMENT OF THE CASE

This is a suit brought by Respondent, Walter Camenisch, a deaf graduate student, against Petitioner, The University of Texas at Austin, a state institution of higher education, seeking injunctive relief to compel Petitioner to provide Respondent with a sign language interpreter to assist him in his classroom work at Petitioner University. (A. 4). Respondent contends that Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and the Regulations promulgated by the Department of Health, Education & Welfare pursuant thereto require Petitioner to provide such services. (A. 7).

Prior to filing this action, Respondent requested the Petitioner to provide him with a sign language interpreter. The Petitioner denied Respondent's request on the grounds that he did not meet the Petitioner's established criteria for financial assistance to graduate students. (A. 15).

At the hearing in District Court, Respondent testified that the Petitioner had accommodated his handicap at all times by allowing Respondent to have an interpreter in the classroom. (A. 51). That interpreter was paid by Respondent. It was stipulated at the trial that the Petitioner was the recipient of federal funds, but no showing was made that any of the programs or activities in which Respondent took part received federal financial assistance. (A. 30).

The District Court found Section 504 and the HEW Regulations applicable to Respondent's claim and ordered Petitioner to procure and compensate a qualified interpreter to assist Respondent in his classes. (See District Court judgment appended to the Petition). The Petitioner complied with the District Court order, and Respondent posted a bond in order that the Petitioner might be reimbursed in the event that the order of the District Court was set aside on appeal. (A. 70).

The Petitioner appealed from the mandatory injunction entered by the District Court. After briefs had been submitted to the Court of Appeals for the Fifth Circuit by the parties, this Court decided *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), and counsel for both parties were asked to comment by letter briefs and in oral argument upon the possible implications of the *Southeastern Community College* decision upon this case. The Court of Appeals affirmed the District Court, holding that a private cause of action should be implied under Section 504 and that the Petitioner was required to bear the expense of furnishing Respondent with an interpreter, *Southeastern Community College* notwithstanding. The Fifth Circuit denied the University's Motion for Rehearing En Banc, and these certiorari proceedings followed.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit, *Camenisch v. The University of Texas, et al., supra*, requiring the University to expend monies to provide an interpreter for a deaf graduate student, completely misconstrued this Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979). Section 504, relied upon by the Court of Appeals to support its determination, merely prohibits discrimination against the handicapped in

programs receiving federal financial assistance. Section 504 does not require a covered institution to expend monies to make programs accessible.

Moreover, Section 504 does not create a private cause of action on behalf of handicapped participants in programs receiving federal financial assistance. The intent of Congress, as evidenced by the plain meaning of the language of 504 and by the legislative history of its amendments and proposed amendments, clearly demonstrate that there is no private right of action to enforce the provisions of Section 504 with respect to state institutions and agencies.

Assuming, arguendo, that Section 504 requires affirmative action by covered state institutions and that a private cause of action may be maintained, a handicapped plaintiff must meet the threshold burden of demonstrating that the program in which he participates receives federal financial assistance before there is an entitlement to relief under Section 504.

ARGUMENT

I.

THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*, 442 U.S. 397, 99 S.Ct. 2361 (1979), SO AS TO REQUIRE THAT THE UNIVERSITY OF TEXAS PROVIDE AUXILIARY SERVICES AND AFFIRMATIVE ACTION UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. §794 AND ASSUME THE FINANCIAL AND ADMINISTRATIVE BURDENS OF FURNISHING AN INTERPRETER FOR A DEAF GRADUATE STUDENT TO ASSIST HIM IN HIS CLASSROOM WORK.

The Fifth Circuit held that this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), *did not prohibit* the imposition on Petitioner, the University of Texas at Austin, of the financial and administrative burdens of furnishing an interpreter for Respondent, a deaf graduate student, to assist him in his classroom work. The Fifth Circuit, in construing *Southeastern Community College*, stated that:

> "The decision in *Southeastern Community College* was clearly not intended to bar relief under this statute for all handicapped people in the future." 616 F.2d 127, 132.

The Fifth Circuit further stated that:

> ". . .the Supreme Court's decision in *Southeastern Community College* says only that §504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him for ever realizing the principal benefits of the training. While such a rule obviously needs more clarification, it is clear that, in this case, Camenisch's claim can succeed on the merits, despite the holding in *Southeastern Community College*, since he can obviously perform well in his profession." 616 F.2d 127, 133.

Such a narrow reading of this Court's decision in *Southeastern Community College* is erroneous because it ignores the clear holding that Section 504 itself does not impose an affirmative action obligation upon Petitioner to provide the requested services and that HEW lacks the authority to create such an affirmative action obligation pursuant to the language of Section 504.

While under *Southeastern Community College* a university might be required to permit a blind student

to tape record lectures where the practice is otherwise forbidden or to permit a deaf student to use an interpreter in the classroom at the student's expense (which was allowed by the Petitioner in this case), *no financial* obligation to provide such a service can be imposed on the Petitioner by virtue of Section 504 of the Rehabilitation Act of 1973.

In *Southeastern Community College*, this Court stated as follows:

> "The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps."
>
> * * * *
>
> "Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions [§§601(b), 503(a), 504] demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so."
>
> * * * *
>
> "Here neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so." 99 S.Ct. 2361, 2369-70.

The Petitioner supports reasonable affirmative action obligations when they are the result of the express will of the Congress, and the Petitioner agrees that it must *accommodate* handicapped students in some cases where no financial outlay is required. However, a reading of the entire Rehabilitation Act of 1973 reveals that Section 504 of the Act was not, and is not, intended to impose financial obligations on the states or state institutions such as Petitioner.

The Rehabilitation Act establishes the Federal Rehabilitation Service Administration and provides for a number of programs to assist the handicapped. Among the services offered are evaluation, counseling, training, restoration, placement and maintenance of the handicapped, and architectural and transportation barriers are also addressed. Federal monies are appropriated to carry out these services.

As the final provision of the Rehabilitation Act, Congress added Section 504 (29 U.S.C. §794), which provides:

> "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

This is all Congress said on the subject of programs receiving federal financial assistance and the participation of handicapped persons in these programs. Nothing was said concerning the enforcement responsibilities of this legislation or the consequences of any violation of the statute. No monies were appropriated by Congress to fund any affirmative action or reasonable accommodation steps or processes

which may be required to permit the handicapped to engage in federally assisted programs which may be inaccessible or unavailable unless some accommodation is made in favor of the handicapped.

On April 29, 1976, Executive Order No. 11914 was issued which dealt with non-discrimination in federally assisted programs. Therein, the President conferred on the Department of Health, Education & Welfare (an action questioned by the Petitioner), the power to interpret, administer and enforce the provisions of Section 504. However, the Executive Order did not direct HEW to construct an affirmative action program under the aegis of Section 504.

In late 1978, Section 504 was amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, §119, 92 Stat. 2982 (1978), so as to prohibit discrimination by federal agencies and to require that such agencies indicate compliance by the establishment of regulations to implement the non-discrimination mandate. *No such requirement was imposed by Congress on recipient agencies, other than federal, to take any affirmative compliance steps.*

At the same time that Section 504 was amended to include federal agencies, new handicapped programs were enacted to remove architectural and transportation barriers, to provide employment opportunities for the handicapped, and to provide for "independent living" by handicapped persons. [Pub. L. 95-692, codified as 29 U.S.C. §§794(b), 795 and 796.] While federal monies were provided for these new programs, Congress again failed to make federal appropriations to provide for accommodation of the handicapped in federally assisted programs covered by Section 504.

The Fifth Circuit, In *Camenisch, supra*, found that "HEW regulations [45 C.F.R. §84.44(d)(2) 1979] require

institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters." 616 F.2d 127, 133. The Fifth Circuit further stated that "the University denied Camenisch his request for sign language interpreter services on the grounds that he did not meet the University's established criteria for financial assistance to graduate students." 616 F.2d 127, 129.

Clearly, the issue before this Court is not a refusal to accommodate a handicapped student, but, instead, whether an "entitlement" exists pursuant to Section 504 for handicapped students which automatically imposes an onerous financial burden on institutions of higher education to meet affirmative action obligations created, not by the Congress, but by HEW through regulations such as 45 C.F.R. §84.44(d)(2) 1979.[1] If such an "entitlement", as has been imposed by HEW, is upheld by this Court, the limited resources committed to higher education by the State of Texas must be diverted and diluted to accommodate a costly quasi-rehabilitation role through the provision of "auxiliary aids", including sign language interpreters. In addition to the financial burden involved, the administrative burden of recruiting qualified sign language interpreters capable of accurately functioning in a myriad of educational specialties, each with its own technical language, is not an insignificant problem.

[1]In a cost survey prepared for HEW, the estimated annual pecuniary cost of compliance with the act has been set at 3.2 billion dollars. D. O'Neill, *Discrimination Against Handicapped Persons--The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance*, at 65 (May 4, 1977)(unpubished report prepared for the HEW Office for Civil Rights under Orders NO. SA-4141-76 and No. SA-2471-77).

Regulations promulgated by the Department of Health, Education & Welfare which create an entitlement for handicapped students and impose costly affirmative action obligations upon higher education constitute an unauthorized extension of the obligations imposed by Section 504. *Southeastern Community College v. Davis, supra.*

The affirmative action provisions of the HEW Regulations in issue in this case have no statutory basis, and they are invalid. As this Court noted in *United States v. Larionoff*, 431 U.S. 864, 873, n. 12 (1977):

> "12. The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is... [only] the power to adopt regulations to carry into effect the will of the Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

It is patent that Section 504 imposes no such financial liability upon those state institutions and agencies covered by the Act, and the Court of Appeals' decision in this case is erroneous in holding that it does.

II.

THE COURT OF APPEALS INCORRECTLY HELD THAT SECTION 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE CAUSE OF ACTION IN FAVOR OF HANDICAPPED PERSONS.

The Fifth Circuit Court of Appeals found that Section 504 creates a private, individual right of action for equitable relief, relying upon the decision of *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) and its progeny -- *Kampmeir v. Nyquist*, 553

F.2d 296 (2nd Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); and *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3rd Cir. 1979). It is interesting to note that the Seventh Circuit recently restated its position on whether a private cause of action exists pursuant to Section 504 in *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980) as follows:

> "Implicit in plaintiff's argument on his Section 504 claim is the assumption that this Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), recognized that a private right of action may be implied under that section. This assumption by Plaintiff, as well as by courts analyzing *Lloyd*, may reflect an over-simplified view of that case and ignores the limitations we there expressed."
>
> * * * *
>
> "We expressly reserved the question whether a private right of action would still be available after final regulations were promulgated." 629 F.2d 1226, 1229-30.

The Seventh Circuit also stated, in a footnote to the *Simpson* case, that ". . .we note that the Supreme Court has yet to express an opinion on whether a private right of action may be implied under §504." 629 F.2d 1226, 1230 n. 7. Indeed, this Court, in a footnote to *Southeastern Community College v. Davis, supra*, expressly declined to rule on the issue of whether a private cause of action should be implied from the language of Section 504. See 99 S.Ct. 2361, 2366 n.5.

In the case of *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979), this Court held that the plaintiff had a right under Title IX of the Education Amendments of 1972 to pursue a private cause of action against the defendant university. In a concurring

opinion, Justice Rehnquist, joined by Justice Stewart, cautioned future litigants as follows:

> "I fully agree with the court's statement that '[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.' *Ante*, at 1967. It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." 99 S.Ct. 1946, 1968.

In his dissenting opinion in *Cannon*, Justice White, joined by Justice Blackman, stated that "...to the extent the Court based its holding on the proposition that an individual protected by a statute always has a right to enforce that statute, it was in error; and a dubious interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent." 99 S.Ct. 1946, 1972.

And finally, Justice Powell, in his dissenting opinion in *Cannon*, questioned the validity of the four-pronged test outlined in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975) stating that the *Cort* analysis has been used to "deflect the relevant inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement", citing twenty examples of circuit court of appeals' decisions since the *Cort* decision which have implied private actions from federal statutes. 99 S.Ct. 1946, 1980.

Justice Powell also cautioned future litigants as follows:

> "Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes." 99 S.Ct. 1946, 1985.

The Petitioner respectfully urges the court to renounce the *Cort* test in determining whether a private cause of action exists in remedial, anti-discrimination congressional enactments because of the difficulties experienced by the federal courts in attempting to apply the test.

However, without regard to the efficacy of *Cort v. Ash*, there are a number of reasons why Section 504 should be distinguished from Title VI and Title IX in determining whether Section 504 creates a private cause of action.

First, it should be noticed that Congress has consistently rejected all bills and amendments that would allow the handicapped a private cause of action under Title VII of the Civil Rights Act of 1964 by including handicapped individuals among those protected against employment discrimination.[2]

[2]Bills and amendments to include the handicapped within Title VII which have been rejected are H.R. No. 7423, 96th Cong. 2nd Sess. (1980); S. Nos. 346, 446, H.R. Nos. 373, 609, 1326, 3345, 96th Cogn. 1st Sess. (1979); H.R. Nos. 998, 1986, 2136, 2904, 4775, 7165, 6577, 6692, 8152, 8153, 9107, 9761, 9860, 11519, 11520, 95th Cong. 2nd Sess. (1978); H.R. Nos. 264, 461, 1107, 1200, 1995, 95th Cong. 1st Sess. (1977); S. Nos. 1311, 1757, H.R. Nos. 1346, 1886, 2515, 3497, 4624, 4625, 4626, 5016, 7061, 7754, 7758, 7946, 8028, 8417, 12541, 94th Cong. (1975-76); S. No. 1780, H.R. Nos. 1120, 2685, 10,960, 11,986, 11,987, 12,654, 12,916, 13,199, 13,200, 93rd Cong. (1973-74); H.R. 10,962, 92nd Cong. (1972).

Second, it is significant that the Civil Rights Attorneys Fee Awards Act of 1976, which amended 42 U.S.C. §1988, fails to mention Section 504 as an applicable statute for obtaining attorneys fees in the enforcement, through private litigation, of an individual's civil rights, suggestive again that Congress intended that no private cause of action be conferred by Section 504. (And, notice is made that Title IX is listed in the Fee Awards Act as a statute supporting the award of attorneys fees to prevailing litigants).

Third, if Congress intended to grant individuals a private cause of action under Section 504, it could and would have done so in clear and unequivocal language. Compare Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401, *et seq.*, providing that an aggrieved individual can bring an action in the state or federal courts, albeit only after the termination of administrative procedures. And, compare the Age Discrimination Act of 1975, 42 U.S.C. §6101, *et seq.*, where Congress specifically amended Section 6104 of the Act (Pub. L. 95-478) in October, 1978, to provide for a private cause of action following the exhaustion of administrative remedies.

Fourth, HEW, the agency first charged with the enforcement of Section 504, did not consider that Section 504 created a private cause of action. Notice should be taken that when Congress amended the Age Distrimincation Act, HEW issued proposed Regulations on December 1, 1978, to establish a procedure for the newly created private cause of action. 45 C.F.R. Part 90, Section 90.50(a)-(c). In contrast, despite the November, 1978, amendments to the Rehabilitation Act of 1973, HEW has expressly declined to establish a similar procedure for a private cause of action pursuant to Section 504, noting that it did not have the power to create a private cause of action without statutory authority. See Appendix A, Page 378, Title 45, C.F.R. Part 84.

It seems crystal clear that Congress has not intended to create a private cause of action to enforce Section 504.[3] This Court should follow the dictates of Congress and find that no private right of action exists under Section 504.

III.

ASSUMING ARGUENDO THAT SECTION 504 REQUIRES AUXILIARY SERVICES AND AFFIRMATIVE ACTION WHICH IMPOSE A FINANCIAL BURDEN ON AN INSTITUTION OF HIGHER EDUCATION, AND FURTHER THAT SECTION 504 CONFERS A PRIVATE CAUSE OF ACTION IN FAVOR OF THE HANDICAPPED, THE PLAINTIFF MUST SHOW THAT THE FINANCIAL ASSISTANCE RECEIVED BY THE INSTITUTION WAS INTENDED TO SUPPORT THE PARTICULAR "PROGRAM" IN WHICH THE HANDICAPPED PLAINTIFF IS ENROLLED OR ENGAGED.

Section 504, 29 U.S.C. §794, prohibits discrimination against otherwise qualified handicapped individuals "under any program or activity receiving federal financial assistance." Similar language appears in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

In this case, the Petitioner received federal financial assistance. The type of aid and for what purpose was not disclosed. Certainly, there was no showing or proof that

[3]The will of Congress in the case of Section 504 could not be more clearly shown unless Congress expressly stated that "no private cause of action is created." However, the judiciary should not impose such a requirement upon Congress. Instead, the courts should follow the policy of denying a private cause of action unless Congress has expressly so provided.

any of the programs or activities engaged in by Respondent received financial aid from the federal government.

The Court of Appeals for the Fourth Circuit has held that there is no Section 504 coverage unless the program in which discrimination is asserted has received federal financial assistance. *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978) cert. denied, 442 U.S. 947 (1979). The Eighth Circuit has followed the *Trageser* case in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980), cert. denied, ____ U.S. ____, 49 U.S.L.W. 3251.

The Fifth Circuit Court of Appeals has required a showing of federal aid to a specific program and a further showing of discrimination within the particular program receiving federal monies in order to trigger coverage under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. *Board of Public Institutions of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969).

To this same philosophical effect, in determining coverage under Title IX, are the decision in *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979) cert. denied, 100 S.Ct. 467 (1979); *Isleboro School Community v. Califano*, 593 F.2d 424 (1st Cir. 1979) cert. denied, 100 S.Ct. 467 (1979); *Junior College District of St. Louis v. Califano*, 593 F.2d 114 (8th Cir. 1979) cert. denied, 100 S.Ct. 467 (1979); *Seattle University v. United States Department of HEW*, 621 F.2d 992 (9th Cir. 1980) cert. granted, ____ U.S. ____, 49 U.S.L.W. 3401; and *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980).[4]

[4]The Fourth Circuit has affirmed, without an opinion, a decision of a district court that reached an opposite conclusion and determined that coverage under Title VI is generated by any federal financial assistance to an institution without regard to whether a particular program or activity that forms the genesis of a

In the recent case of *Dougherty County School System v. Harris, supra,* the Fifth Circuit restated the program-specific philosophy it first postulated in the *Finch* case, supra, as follows:

> "Even according great latitude to the Secretary, we cannot find sanction in the statute for his conclusion that any discrimination in an entire school system so taints the system as to permit termination of all federal even though federally assisted programs are administered impeccably. The regulations attempt to regulate sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly." 622 F.2d 735, 737.

In the case now before the Court, Petitioners assert that there has been no showing that the specific programs and activities in which Respondent took part received federal financial assistance. This showing is a threshold predicate to be established by any plaintiff before any action by a district court can be taken, including the entry of a preliminary injunction. There was, accordingly, no jurisdiction for the District Court to consider this case and require the expenditure of funds by the Petitioner.

lawsuit has received federal monetary aid. *Bob Jones University v. Johnson,* 396 F.Supp. 597 (D.C.S.C. 1974), aff'd 529 F.2d 514 (4th Cir. 1975). However, apparently, the program-specific argument was not raised by the litigants. Indeed, the decision in *Bob Jones University* may have been overruled by the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center, Inc., supra.*

CONCLUSION

Petitioner prays that this Court reaffirm its decision in *Southeastern Community College v. Davis* and reiterate that Section 504 does not require a covered institution to take affirmative steps, such as providing a sign language interpreter for Respondent, in order to enable the handicapped to participate in institutional programs. Petitioner further prays that this Court hold that Section 504 confers no private cause of action in favor of the handicapped.

In the alternative, should this Court hold that Section 504 does provide a private cause of action and does impose an affirmative burden upon institutions to provide services of the kind requested by Respondent, Petitioner prays that such cause be remanded to the District Court with instructions that Respondent must first prove that the program in which he was enrolled at The University of Texas at Austin received federal financial assistance in order to trigger coverage under Section 504.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General, do hereby certify that three copies of the foregoing Brief for Petitioner to the United States Court of Appeals for the Fifth Circuit were served upon Respondent by depositing same in the United States mail, certified, return receipt requested, to the following attorneys of record for Respondent: Marc P. Charmats, National Association of the Deaf Legal Defense Fund, P.O. Box 1793, Seventh Street and Florida Avenue, N.E., Washington, D.C. 20002; Charles Smith, 812 San Antonio, Suite G-11, Austin, Texas 78701, on this the _____ day of December, 1980.

LONNY F. ZWIENER
Assistant Attorney General

No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

(1) Whether this Court should address any issues on this review of the grant of a preliminary injunction beyond deciding whether the District Court abused its discretion.

(2) Whether the Department of Health, Education and Welfare was authorized by Section 504 of the Rehabilitation Act of 1973 to require universities receiving federal aid to provide sign-language interpreters for deaf students who are qualified for the universities' programs.

(3) Whether an individual may bring a private action for injunctive relief against an institution that is allegedly denying him auxiliary aids required by § 504 of the Rehabilitation Act of 1973 and the HEW regulations issued thereunder.

(4) Whether the appeal to the Court of Appeals from the grant of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1) was moot and should have been dismissed after the only act required by the injunction had been performed.*

---

* Respondent does not believe that the third question presented by the petition—whether § 504 of the Rehabilitation Act of 1973 and the regulations thereunder require the provision of auxiliary aids if federal aid was not received for the specific program in which the handicapped student is enrolled—is properly presented to this Court, since it was not briefed, argued or decided in either court below. See pp. 12-13, *infra*.

PARTIES TO THE PROCEEDING

The parties against whom respondent Camenisch brought suit in the District Court are listed in the petition at p. ii. According to petitioner, the individuals there listed no longer serve in the official capacities in which they were in part sued. Pursuant to Fed. R. Civ. P. 25(d)(1), however, their successors are automatically substituted as defendants.

Their successors, as of this writing, are as follows:

Chancellor of the University of Texas, Dr. E. W. Walker;

Chairman of the Board of Regents of the University of Texas, none (position vacant);

President of the University of Texas at Austin, Dr. Peter Flawn;

Vice President of Administrative Services of the University of Texas at Austin, none (position abolished).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-317

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals (Pet. App. A-1) is reported at 616 F.2d 127; the judgment of that Court (Pet. App. A-24) is not reported. The memorandum opinion and order of the District Court on the preliminary injunction (Pet. App. A-18) and its judgment on that injunction (Pet. App. A-23) are not reported.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). (See Pet. Br. 2.) Respondent suggests, however, that the Court of Appeals did not have jurisdiction over the appeal from the preliminary injunction under 28 U.S.C. § 1292(a)(1), and that this Court accordingly lacks jurisdiction, because that appeal became moot when the injunction was fully satisfied. See Part IV of the Argument, pp. 40-44, *infra*.

STATUTES AND REGULATIONS INVOLVED

Sections 504 and 505 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 92 Stat. 2982-83, and codified at 29 U.S.C. §§ 794 and 794a (Supp. III, 1979), are reproduced in Appendix A, *infra* (p. 1a).

The Regulations of the Department of Health, Education and Welfare on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. pt. 84 (1979), are reproduced in Appendix B, *infra* (p. 3a). The relevant parts of the Department's Analysis of Final Regulations, 45 C.F.R. pt. 84, Appendix A (1979), are reproduced in Appendix C, *infra* (p. 41a). These regulations are now under the jurisdiction of the Department of Education and have been recodified, with no change in substantive content, as 34 C.F.R. pt. 104. 45 Fed. Reg. 30936 (May 9, 1980).

STATEMENT OF FACTS

Petitioners seek review of a judgment of the Court of Appeals affirming a District Court order granting a preliminary injunction.

A. The Pleadings

Respondent Camenisch filed suit on March 1, 1978, in the United States District Court for the Western District of Texas against petitioner University of Texas and several officials thereof ("the University").[1] Camenisch, who is deaf, was at the time a graduate student at the University of Texas at Austin. The complaint (J.A. 4-7) sought a declaration that the University's refusal to provide Camenisch with a sign-language interpreter violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), and the auxiliary aid regulation issued thereunder, 45 C.F.R. § 84.44(d) (1979),

[1] See Pet. at ii; see also p. ii, *supra*.

and violated the Equal Protection Clause of the Fourteenth Amendment. In addition, it sought preliminary and permanent injunctions to require the University to provide Camenisch with an interpreter at University expense "while he is a student in good standing at the defendant University." (J.A. 8; see also J.A. 16.)

The defendants filed a motion to dismiss, claiming that Camenisch was required first to exhaust administrative remedies, that there is no private right of action to enforce § 504, and that the claims against the University and against the other defendants in their official capacities were barred by the Eleventh Amendment. (J.A. 23-27.) At the same time, defendants filed an answer that denied most of the material allegations of the complaint. (J.A. 27-28.)

B. Stipulated Facts and the Hearing on the Preliminary Injunction

Immediately prior to the preliminary injunction hearing on May 11, 1978, the parties entered into a short stipulation of facts (J.A. 30-32) which provided as follows:

Camenisch is a handicapped individual within the meaning of § 7(6) of the Rehabilitation Act of 1973, 29 U.S.C. § 706(6) (1976)[2] and a qualified handicapped individual, as defined in 45 C.F.R. § 84.3(k)(3) (Stip. ¶¶ 7-8, J.A. 30).

Camenisch was employed as Dean of Students on one of the campuses of the Texas School for the Deaf, a position to which he had been appointed on an acting basis. His employment was contingent upon his taking courses to obtain a Master's Degree. Camenisch planned at the time to take at least three hours of graduate courses in the summer of 1978 at the University. (Stip. ¶ 9, J.A. 31.)

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[2] The provision has since been amended, with no substantive change applicable to Camenisch. 29 U.S.C. § 706(7)(B) (Supp. III, 1979).

Camenisch is a deaf man "who need[ed] the services of a qualified [sign-language] interpreter in order to effectively participate in the educational program operated by the defendants." (Stip. ¶ 10, J.A. 31.) Camenisch had requested the University to provide funds for an interpreter as early as the fall of 1977, but the University provided neither interpreters nor funds to pay for them. (Stip. ¶¶ 11-16, J.A. 31-32.) Camenisch had paid $1,245 for interpreter services for nine courses at the University during his graduate studies up to that time. (Stip. ¶ 16, J.A. 32.) Camenisch did not meet the established criteria for financial assistance to graduate students at the University of Texas at Austin, even when the cost of interpreters was added to his expenses for determining these criteria.[3]

The University of Texas at Austin received federal financial assistance in excess of $31,400,000 and had a budget in excess of $200 million for the year ending August 31, 1978. (Stip. ¶ 18, J.A. 32.) The University had signed an HEW Assurance of Compliance form as a condition of receiving federal financial assistance. (Stip. ¶ 17, J.A. 32; J.A. 41.)

At the hearing on the preliminary injunction (May 11, 1978, J.A. 44), Camenisch testified (through an interpreter) that he needed a sign-language interpreter for his courses at the University because

> "it is difficult for deaf people to try to read lips—or to try to lip read. And you can't tell the professor to try to face you at all times, because most of the time the professor wants to move around, tries to write on the blackboard at the same time as he is talking, and I will not be part of the class. * * * And some students may sit behind me and I am not able to read their lips because they are behind me.

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[3] The University's criteria for financial assistance to graduate students are not in the record. Camenisch's salary at the Texas School for the Deaf was approximately $1,000; he and his wife together had a combined gross income in excess of $23,000. (Stip. ¶ 9; J.A. 31.)

> Some students may ask the professor some questions and I would miss a lot." (J.A. 49-50.)

He further testified that he needed only three more hours of course work to complete his Master's Degree. (J.A. 51.)

C. The District Court Decision and Related Actions

On May 17, 1978, applying the Fifth Circuit standards for preliminary relief set forth in *Canal Authority* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974), the District Court ordered that a preliminary injunction issue, requiring defendants "to procure an interpreter or other effective method of making orally delivered course materials available to Plaintiff during his completion of his Master's work at Defendant University." (Pet. App. A-22.) That relief was conditioned on Camenisch posting a security bond in the amount of $3,000 "pending the outcome of this litigation." (*Id.*) The Court further ordered that the action be stayed pending a final administrative determination by HEW and that, as a condition of the preliminary injunctive relief, Camenisch initiate an administrative complaint with HEW. (*Id.*) Camenisch filed an administrative complaint with the Department of HEW on May 26, 1978. (R., Vol. I, 149-53.)

Both the District Court (May 22, 1978) and the Court of Appeals (June 28, 1978) denied defendants' applications for a stay pending appeal. (R. Vol. I, 144-48 & 179-80.) The bond required by the District Court was filed by Camenisch and approved by the Court on June 6, 1978. (J.A. 70-73.)

The University appealed from the issuance of the preliminary injunction to the United States Court of Appeals for the Fifth Circuit. See 28 U.S.C. § 1292(a)(1). In its brief on appeal, the University argued that there is no private right of action available under § 504 of the Rehabilitation Act of 1973 (pp. 2, 5-24) and that, alternatively, injunctive relief was improper prior to exhaustion of administrative remedies provided by HEW regulation (pp. 2, 24-27).

On January 24, 1980, before oral argument in the Court of Appeals, the Department of HEW issued a letter of finding on Camenisch's administrative complaint. The Department concluded that the University was "in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with impaired sensory skills, thus denying handicapped students equal educational opportunities." The Department stated that "the requested interpreter services were necessary for Camenisch to fully participate in the educational program in which he was enrolled," and that "[t]he financial status of a qualified handicapped student is not an acceptable criteria for determining whether necessary auxiliary aids will be provided." [4]

D. The Court of Appeals Decision

On April 28, 1980, the Court of Appeals affirmed the District Court's grant of preliminary injunctive relief. (616 F.2d 127, Pet. App. A-1.) The Court noted that appellate review of a preliminary injunction was limited to an examination of whether the district court abused its discretion and approved the application of the standards for preliminary relief set out in *Canal Authority, supra.* (Pet. App. A-4.) It found that the balance of hardship weighed strongly in favor of Camenisch. (*Id.* at A-4 to A-5.) It considered the other factors—the public interest and the probability of success on the merits—in connection with an examination of the merits of Camenisch's claim. (*Id.* at A-5.)

Addressing the issue of a private right of action under § 504, the Court ruled that the issue was not moot—even though Camenisch had already received the relief he sought—because the injunction bond preserved the issue of who was liable for the cost of Camenisch's interpreter

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[4] This letter was provided to the Court of Appeals (616 F.2d 127, 130 n.3; Pet. App. A-3 n.3), but did not become part of the record. It is reproduced in Appendix D, *infra* (p. 66a).

and thus kept the controversy alive. (*Id.* at A-5 to A-6.)[5] It then declared itself in agreement with the other Courts of Appeals that have found a private right of action for injunctive relief under § 504, and it rejected the University's argument that any judicial remedy must be limited to "a post-administrative remedy judicial review." (*Id.* at A-6 to A-9.) In addition, the Court rejected the University's argument that the then-recent decision of this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), barred Camenisch's claims. (*Id.* at A-11.)

Finally, the Court of Appeals ruled that the District Court had erred in conditioning the grant of preliminary injunctive relief on Camenisch's filing of an administrative complaint with HEW, stating that "private individual suits to enforce Section 504 rights can be brought without previous resort to administrative remedies." (Pet. App. A-16.)

The Court of Appeals concluded: "We therefore uphold the district court's order granting injunctive relief, but vacate that part of the order which conditioned the grant of relief on the filing of an administrative complaint with HEW. We also dissolve the stay of the action." 616 F.2d at 136.[6]

SUMMARY OF ARGUMENT

1. The University seeks review of a preliminary injunction that expired more than two years ago. It does not contend that the District Court abused its discretion in granting the preliminary injunction at that time. The

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[5] Neither party briefed any issue of mootness. The Court of Appeals itself raised the issue of possible mootness at oral argument, having established that Camenisch had received his Master's Degree, as scheduled, after his one course in the summer of 1978. While not in the record, counsel represent that Camenisch received a Master's Degree in Education on August 21, 1978.

[6] The quoted words do not appear at the end of the opinion as reprinted at Pet. App. A-17, but do appear in the reported version as cited above.

University's interest lies, instead, in having this Court establish that Camenisch cannot prevail on the merits of his lawsuit. On appeals from preliminary injunction orders, however, appellate courts do not decide threshold issues going to the merits unless there is some substantial justification for doing so. That discretionary authority to expand the scope of review should not be exercised in this case, where (a) there is no developed factual record on the extent of the financial and administrative burdens imposed by the HEW regulation requiring interpreters for qualified handicapped students; (b) the private right of action issue need not be decided in light of *Maine v. Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980); and (c) the "program specificity" issue was not briefed, argued or decided in either court below. Accordingly, under the unchallenged standards for review of preliminary injunction orders, the judgment below should be affirmed.

2. The University concedes that the applicable HEW regulation, 45 C.F.R. § 84.44(d) (1979), requires it to provide a sign-language interpreter to Camenisch, a graduate student fully qualified for the program in which he was enrolled. That regulation struck a balance between the non-discrimination mandate of § 504 of the Rehabilitation Act of 1973 and the costs of compliance by recipient institutions. It is consistent with both the language and legislative history of the original act and the legislative history of the 1978 amendments.

The University contends that this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), means that § 504 was not intended to impose *any financial obligation* on recipient institutions. *Davis*, however, acknowledged that the elimination of discrimination under § 504 might involve costs to recipient institutions. *Id.* at 411 n.10. In addition, it specifically recognized the role of HEW in identifying "those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the

handicapped." *Id.* at 413. HEW's regulatory determination that provision of interpreters is necessary to eliminate discrimination against the handicapped is directly supported by this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974). Hence, the regulation does not require the kind of "affirmative action" held to be unauthorized by § 504 in *Davis*.

3. Whether § 504 confers a private right of action for injunctive relief need not be resolved in this case after *Maine* v. *Thiboutot*, *supra*. That decision establishes that Camenisch had a right of action for injunctive relief against the officials of the University (a state institution) under 42 U.S.C. § 1983. In any event, the Court of Appeals decision that § 504 confers a private right of action is correct in light of *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and is consistent with the decisions of the six other federal courts of appeals that have ruled on the issue.

4. Quite apart from the merits, respondent suggests that the appeal from the preliminary injunction was moot by the time the Court of Appeals ruled. The preliminary injunction was satisfied when Camenisch completed his course requirements for a Master's Degree. The Court of Appeals ruling that the appeal was not moot because Camenisch was required to post an injunction bond is inconsistent with the prevailing rule on liability under injunction bonds and with the policies underlying 28 U.S.C. § 1292(a)(1). Liability under the injunction bond does not turn on affirmance or reversal of the preliminary injunction, but on the final outcome of the underlying lawsuit, and the fact that a plaintiff may ultimately lose the lawsuit does not prevent a preliminary injunction order from becoming moot. 28 U.S.C. § 1292(a)(1) does not authorize interlocutory appeals from expired preliminary injunctions.

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION

As the Court of Appeals noted, appellate review of preliminary injunction orders is generally "limited to an examination of whether the district court abused its discretion." (616 F.2d at 130; Pet. App. A-4.) Similarly, this Court has held that "[i]n reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown* v. *Chote*, 411 U.S. 452, 457 (1973); *accord*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Alabama* v. *United States*, 279 U.S. 229, 230-31 (1929). Given this standard, this Court should affirm the judgment of the Court of Appeals on the ground that the District Court did not abuse its discretion in granting the preliminary injunction, and should decline to rule on the issues presented in the petition for writ of certiorari and in the University's brief.

The University has not challenged in the Court of Appeals or in this Court the propriety of the District Court's reliance on the usual four-factor analysis for considering a motion for preliminary injunction. See *Canal Authority* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974).[7] Nor has it challenged the District Court's application of those factors to the facts of this case. Indeed, as the Court of Appeals concluded, the District Court correctly assessed that Camenisch had a substantial likelihood of succeeding on the merits. As for the

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[7] As the Court of Appeals below stated, those factors are as follows: (1) "Irreparable harm to the plaintiff from failure to issue the injunction"; (2) "The relative lack of harm to the defendant from issuance of the injunction"; (3) "The public interest"; and (4) "Probability that the plaintiff will ultimately succeed on the merits." (616 F.2d at 130; Pet. App. A-4.)

balance of harm between Camenisch and the University, the University has not challenged the conclusion of either court below that those factors weighed in Camenisch's favor.[8]

The University argues instead that the preliminary injunction order was erroneous because Camenisch could not have prevailed on the merits of his claim under § 504 of the Rehabilitation Act of 1973 and the pertinent regulations; and because, apart from those merits, § 504 does not confer a private right of action for injunctive relief. On appeals from preliminary injunction orders, appellate courts do, on occasion, decide such threshold issues going to the merits of the underlying claims, rather than restricting their review to whether the District Court abused its discretion in granting or denying interlocutory relief.[9] Nevertheless, some substantial justification in terms of judicial economy or fairness to the parties must be present before the appellate court thus expands the scope of review; otherwise, interlocutory appeals of insignificant injunctive orders will be encouraged and the policies of 28 U.S.C. § 1292(a)(1) defeated.[10] In this case, such substantial justifications for expanding the scope of review are absent with respect to each of the issues presented; rather, practical considerations call for limiting the scope of review here and affirming the judgment of the Court of Appeals

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[8] Apart from the reasons given by the courts below on the balance of harm, it should be noted that denial of the preliminary injunction would have effectively mooted the case entirely for Camenisch if the University is correct in its contention below (see J.A. 26) that it and its officers in their official capacities are immune under the Eleventh Amendment from retroactive monetary relief. See *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

[9] See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287 (1940); Wright, Miller, Cooper & Gressman, 16 *Federal Practice and Procedure* § 3921 at 16 *et seq.* (1977); 9 *Moore's Federal Practice* ¶ 110.25[1] (2d ed. 1980).

[10] See, *e.g.*, *New York* v. *Nuclear Regulatory Comm'n*, 550 F.2d 745, 759-62 (2d Cir. 1977).

solely on the ground that the District Court did not abuse its discretion.

As to the principal issue argued by the University—whether requiring the University to provide interpreters for qualified deaf students is consistent with this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979)—this case lacks a developed factual record on the extent of the financial and administrative burdens imposed on the University. Apart from the allegations of the complaint, the record below consists of a three-page stipulation of facts (J.A. 30-32), the brief testimony of Camenisch (J.A. 48-51), and seven documentary exhibits (J.A. 33-43 & 61-68). To the extent that the University presents arguments about an "onerous financial burden" and an administrative burden that is "not an insignificant problem" (Pet. Br. at 10), the record is inadequate to make these issues concrete.[11]

As to the second issue pressed by the University—whether § 504 confers a private right of action for injunctive relief—a determination by this Court is unnecessary because Camenisch clearly had a private right of action for injunctive relief under 42 U.S.C. § 1983 against the state university officials. *Maine* v. *Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980). Moreover, no substantial question as to § 504 is presented after the closely related decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and every federal court of appeals considering the issue has found such a right of action.[12]

As to the third issue the University attempts to present —whether § 504 and the applicable regulations applied to Camenisch if the specific program in which he was

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[11] Respondent concedes that the record permits a ruling on the purely legal question presented by the University—whether *any* financial obligation may be imposed by the HEW regulations for the provision of sign-language interpreters to qualified deaf students. (See Pet. Br. at 6-7.)

[12] See cases cited in note 49, *infra*.

enrolled did not receive federal financial assistance—that issue was not briefed, argued or decided in either the District Court or the Court of Appeals. As a result, there is no record at all on that issue. It is by now well-settled that this Court will not consider issues neither raised before nor considered by the District Court or the Court of Appeals. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).[13]

Accordingly, this is not a case for expansion of the usual limited review of preliminary injunction orders, and the judgment of the Court of Appeals should be affirmed on the ground that the District Court did not abuse its discretion.[14] In the remainder of this brief, Camenisch principally addresses the first two issues presented by the University, insofar as the record permits.

II. THE COURT OF APPEALS CORRECTLY CONSTRUED THE REHABILITATION ACT OF 1973 AND THIS COURT'S DECISION IN *SOUTHEASTERN COMMUNITY COLLEGE* v. *DAVIS*

The University has conceded that § 84.44(d) of the HEW regulations requires an educational institution receiving federal financial assistance to accommodate a deaf student by providing and paying for a classroom interpreter. (Pet. Br. at 10.) While the University recognizes its responsibility under § 504 to make some accommo-

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[13] The University seeks a remand of the third issue (Pet. Br. at 19); but an appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent the parties in any way from taking other steps in the litigation while the appeal is pending. Wright & Miller, 11 *Federal Practice and Procedure* § 2962 at 631 (1973). Thus, a remand is not necessary in order for the case to go forward on all appropriate issues.

[14] The University is fully protected by the preliminary injunction bond, should it prevail on the merits of this case after further proceedings below. See pp. 41-42, *infra*.

dations on behalf of qualified handicapped individuals—for example, allowing a deaf student like Camenisch to hire his own classroom interpreter—it considers this statutory obligation to require "no financial outlay." (*Id.* at 8.) As the University understands the law, all accommodations involving any financial expense constitute "affirmative action." (*Id.* at 8-10.) While acknowledging that such financial obligations are permissible if explicitly required by Congress, the University argues that Congress expressed no such will with respect to § 504 of the Rehabilitation Act of 1973. (*Id.* at 8.) The University relies upon this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), to support its position, construing *Davis* to hold that any HEW regulations purporting to implement § 504 in a manner which requires any expense to the recipient would be beyond the agency's lawful authority. (*Id.* at 6-10.)

The University's position hinges upon a misreading of both the Act and this Court's opinion in *Davis*. As is demonstrated below, the legislative history of the Rehabilitation Act and its 1978 amendments reveals that, in calling for accommodation to qualified handicapped persons under § 504, Congress recognized that this obligation would in some circumstances require some financial expense. In fact, Congress in 1978, with full knowledge of the HEW regulations, comprehensively reviewed and amended the Rehabilitation Act. The history of these amendments confirms that the regulation at issue here—which requires recipient institutions to provide classroom interpreters or other effective methods of making orally delivered materials available to hearing-impaired students—is consistent with § 504. Finally, the Court of Appeals correctly distinguished this case from *Davis* in ruling for Camenisch below, and that ruling is directly supported by this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974).

A. Section 84.44(d) of the HEW Regulations Expressly Requires the Provision of Auxiliary Aids for Qualified Deaf Students and Exhibits an Appropriate Concern for the Costs of Compliance

The relevant regulation, 45 C.F.R. § 84.44(d) (1979),[15] provides:

> "*Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
>
> "(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."

This regulation concededly requires recipients to provide either classroom interpreters or other effective methods of making orally delivered materials available to qualified deaf students such as Camenisch.[16]

Section 84.44(d) is a product of an exhaustive and careful rulemaking process which spanned two Adminis-

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[15] As noted at p. 2, *supra*, this regulation has now been recodified, with no change in substantive content, as part of 34 C.F.R. pt. 104. 45 Fed. Reg. 30936 (May 9, 1980).

[16] As Secretary Califano stated in the preamble to the final regulations, one is not "providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction." 42 Fed. Reg. 22676 (1976).

trations.[17] The history of this rulemaking process reveals that HEW explicitly considered the financial concerns of colleges and universities in formulating the final regulations. For example, Secretary Califano stated in the preamble to the final regulations "that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities." 42 Fed. Reg. 22676 (1977).[18]

Indeed, § 84.44(d) places limits on the scope of a university's obligation to provide auxiliary aids to qualified deaf students and represents a careful balance between the non-discrimination mandates of § 504 and the concerns of recipient universities about the costs of compliance. First, the language of the regulation requires universities to provide classroom interpreters or other effective methods of communication only when "necessary to ensure" equal participation and non-discrimination. This limitation recognizes that, depending on their personal skills and particular course of study, not all deaf students

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[17] HEW published a Notice of Intent to Issue Proposed Rules on May 17, 1976, seeking public comment on the draft proposed rules which were attached to the Notice. 41 Fed. Reg. 20296 (1976). Over 300 written comments were received in response to this Notice, and these were supplemented by a series of ten meetings conducted by HEW at various locations across the country. See 42 Fed. Reg. 22676 (1977). On July 16, 1976, the Department published a Notice of Proposed Rulemaking, analyzing the comments received and setting forth revised proposed regulations for further public comment. 41 Fed. Reg. 29548 (1976). Approximately 850 comments were received, and an additional 22 public meetings were held after publication of this July 16 Notice. See 42 Fed. Reg. 22676 (1977). All of this information was considered and analyzed prior to the promulgation of the final rules and regulations on May 4, 1977. *Id.* at 22676-77.

[18] When the regulations were proposed, HEW published a study conducted for the Department that concluded: "It is not expected that subpart E [which includes § 84.44(d)] . . . will impose significant additional costs" on institutions of higher education. 41 Fed. Reg. 20312, 20360 (1976).

will require auxiliary aids. Some deaf individuals are excellent lipreaders and have understandable speech. Even for those students whose primary mode of communication is sign-language, the course of study—for example, laboratory work or independent study—may not necessitate the use of interpreters. Second, § 84.44(d) affords recipients flexibility in choosing the type of auxiliary aids when such aids are required. Thus, in certain situations, provision of class notes or transcripts of lectures or no auxiliary aid at all will fulfill the regulatory requirement. Finally, the regulation expressly limits the provision of auxiliary aids to classroom or class-related activities by providing that "[r]ecipients need *not* provide attendants, individually prescribed devices, readers for *personal* use or study, or other devices or services of a *personal* nature." (Emphasis added.)

This careful balancing is further illustrated by the HEW Analysis of Final Regulations for § 84.44(d). (45 C.F.R. pt. 84, App. A at 377 (1979); p. 41a, *infra*.) This Analysis emphasizes that even when an interpreter is necessary to enable a deaf student to participate effectively in class, "recipients can usually meet this [auxiliary aid] obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges and universities."[19] (*Id.* at 392; pp. 62a-63a, *infra*.) Thus, although universities bear the ultimate responsibility for proving auxiliary aids to qualified deaf students when necessary, HEW took account of the availability of money from other sources in outlining the scope of the universities' obligation.[20]

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[19] The variety of funding sources for auxiliary aids is explored more fully at note 39, *infra*.

[20] In the event that outside funding sources cannot be located, the HEW Analysis provides that "the institution has flexibility in choosing the methods by which the aids will be supplied. For ex-

B. Section 84.44(d) of the HEW Regulations Is Valid Because It Is Reasonably Related to the Purposes of § 504 as Shown by the Language and Legislative History of the Statute

While the University concedes that § 84.44(d) requires the result sought by Camenisch, it contends that the regulation exceeds the authority conferred by § 504.

It is a well-established rule that the validity of a regulation will be sustained if the regulation is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81 (1969); *accord, Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).[21] Both the language of § 504 and its legislative history show that the auxiliary aid requirement of § 84.44(d) is reasonably related to the purposes of the statute.[22]

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ample, some universities have used students to work with the institution's handicapped students." (45 C.F.R. pt. 84, App. A at 392 (1979); p. 63a, *infra*).

[21] The *Thorpe* rule applies when a regulation has been promulgated pursuant to proper rulemaking authority. The University does not contest HEW's authority to promulgate substantive regulations under § 504, and such rulemaking authority was conferred with the enactment of the statute. *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976); see S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). This rulemaking authority is recognized by the Court in *Southeastern Community College* v. *Davis*, 442 U.S. at 413.

[22] In *Southeastern Community College* v. *Davis*, 442 U.S. at 411-12 n.11, the Court suggested that the HEW regulations under § 504 are to be accorded diminished deference because they were promulgated only after HEW was enjoined to do so in *Cherry* v. *Mathews*, 419 F. Supp. 922 (D.D.C. 1976). This statement appears to be based on an erroneous factual premise. First, as early as May 1974, HEW recognized its responsibility to develop § 504 regulations. 39 Fed. Reg. 18582 (1974). Second, the HEW regulatory process was in fact well under way before the injunction order in *Cherry*. Both draft regulations, 41 Fed. Reg. 20296 (1976), and proposed regulations, 41 Fed. Reg. 29548 (1976), had been published before the Cherry decision issued on July 19, 1976. Further, HEW maintained in *Cherry* that it had authority to issue regulations, and the only dispute was how soon HEW would issue the

1. *The Original Enactment of § 504*

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. III, 1979), provides, in pertinent part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." [23]

The language and brief legislative history of the original enactment of § 504 in 1973 establish that § 504 is a civil rights statute, the primary purpose of which is to eliminate discrimination against qualified handicapped persons and increase their opportunities to participate in and benefit from federally funded programs.[24] Of particular relevance to the present case, Congress focused on equal educational opportunities for qualified handicapped

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final regulations. Memo. in Opposition to Plaintiffs' Motion for Summ. Judgment & in Support of Defendants' Cross Motion for Judgment at 2 (May 10, 1976). In light of these facts, the regulation at issue should be afforded the full deference usually given the interpretation of a statute by the agency charged with its administration. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); 2 K. Davis, *Administrative Law* § 7:22 at 105-08 (2d ed. 1979).

[23] The quoted words have not changed since the original enactment of the statute, although language was added by the 1978 Amendments which expressly extended coverage of the statute to the federal government. See p. 23, *infra*.

[24] Section 504 was initially proposed by Congressman Vanik and Senator Humphrey as an amendment to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. See H.R. 12154, 92d Cong., 1st Sess. (1971), 117 Cong. Rec. 45945 (1971); S. 3044, 92d Cong., 2d Sess. (1972), 118 Cong. Rec. 526 (1972). Sen. Humphrey stated that the final version of § 504 as part of the Rehabilitation Act did "carry through the intent of original bills." 118 Cong. Rec. 32310 (1972). See also 119 Cong. Rec. 11823-24 (1973) (remarks of Rep. Vanik). As a civil rights statute, § 504 should be interpreted in a manner that accords as broad a sweep as its language permits. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 98 (1971); *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409, 437 (1968).

individuals and intended that recipients of federal financial assistance accommodate the needs of such individuals even where expense would be involved.

Senator Percy, one of the original Senate sponsors, stated that the purpose of the statute was to realize the commitment "to eliminate the glaring neglect of our handicapped citizens," and "*guarantee*[] *the handicapped equal opportunity to education* . . . ." 118 Cong. Rec. 526 (1972) (emphasis added). Similarly, Representative Vanik, the chief sponsor of the predecessor of § 504 in the House of Representatives, explained the purpose of the statute as follows:

> "*Education* and vocation training is perhaps the great equalizer of employment opportunity in that it provides the individual with the most basic tools of any trade. *Education of the handicapped is one of the most cost-effective endeavors* the American educational enterprise has ever undertaken.
>
> . . . .
>
> "There is a vital message in the decision for those in America who wish to protect the *civil rights* of the handicapped. *Not only is exclusion from educational services a discriminatory practice, but it is a violation of due process rights.*
>
> . . . .
>
> "My proposed legislation will ensure *equal educational and employment opportunities for the handicapped by making discrimination illegal in federally assisted programs and activities.*"

117 Cong. Rec. 45974-75 (1971) (emphasis added).[25] See also 119 Cong. Rec. 7105 (remarks of Rep. Peyser), 24586-87 (remarks of Sen. Randolph) (1973); 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey).

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[25] This Court has often noted that the statements of the legislative sponsors deserve substantial weight in interpreting a statute. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967).

The emphasis on ensuring equal educational opportunities for handicapped individuals is inescapable in the legislative history of § 504.[26] And Representative Vanik's comments concerning the cost-effectiveness of providing these equal educational opportunities reflects a recognition that elimination of discrimination in the educational area would involve some costs. The enactment of § 504 indicates that Congress felt these costs to be outweighed by the benefits.[27] Accordingly, the provision of classroom interpreters for qualified deaf students—as required by § 84.44(d)—falls within the costs that Congress deemed necessary to ensure equal educational opportunities for these students.

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[26] On the same day that the Senate Committee issued its report on the Rehabilitation Act of 1973, it issued a report on the White House Conference on Handicapped Individuals Act, Pub. L. No. 93-561, tit. III, 88 Stat. 1631-34, 29 U.S.C. § 701 note (1976). The Committee expressed its commitment to solving "the real needs of handicapped who are young adults, or adults, and have been excluded from school in the past, or desire continuing adult and higher education or retraining in a particular skill. The Committee is aware that at the present time most of these avenues are not open to the handicapped, and would like to see this situation changed." S. Rep. No. 93-319, 93d Cong., 1st Sess. 8 (1973). Similarly, § 801 of the Education Amendments of 1974, 20 U.S.C. § 1221-1 (1976), states: "Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential *without financial barriers*." (Emphasis added.)

[27] Studies show that investment in college education for the handicapped reduces welfare costs, expands the tax base, and increases productivity. If disabled people were as well-educated as the general populace, it has been estimated that "yearly governmental savings, in the form of reduced welfare costs and increased tax income, [would be] between 10 and 15 billion dollars." D. Finnegan, *Disabling the Disabled: Discrimination in Higher Education* 19 n.14 (Berkeley, Cal., September 1979).

2. *The 1978 Amendments to the Rehabilitation Act and Their Legislative History*

In 1978, Congress extensively amended the Rehabilitation Act of 1973.[28] In the course of considering these amendments, Congress comprehensively reviewed both the Act as a whole and the HEW regulations promulgated thereunder. We show below that Congress paid careful attention to § 504 and, more specifically, to the needs of deaf persons in enacting several amendments directly related to the requirements of § 504. These amendments and their legislative history confirm that § 84.44(d) is consistent with § 504.[29]

Several of the significant amendments enacted in 1978 facilitate enforcement and broaden the coverage of § 504. A new § 505(a)(2) was added to the Act; it provides:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this title." 29 U.S.C. § 794a(a)(2) (Supp. III, 1979)

An attorney's fees provision, § 505(b), 29 U.S.C. § 794a(b) (Supp. III, 1979), was added to "assist in vindicating private rights of action . . . under . . . 504." S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). A new § 507, 29 U.S.C. § 794c (Supp. III, 1979), was added to create an

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[28] Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (Nov. 6, 1978) (hereinafter referred to as the "1978 Amendments").

[29] These amendments, enacted eight months after Camenisch filed his complaint against the University, must be taken into account in passing on the validity of the HEW regulation at issue. To do otherwise would be inconsistent with the well-established rule that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974).

Interagency Coordinating Council to promote the "implementation and enforcement of the provisions of [Title V], and the regulations prescribed thereunder." Finally, Congress appended language to § 504 itself, extending its coverage to programs and activities operated by the federal government.[30]

Several other provisions added to the Rehabilitation Act by the 1978 Amendments reflect a Congressional intent to confront the unique problems of deaf persons, and to assist recipients in meeting the recognized auxiliary aid obligations under § 504 and the relevant HEW regulation. For instance, new § 305(a)(2), 29 U.S.C. § 775(a)(2) (Supp. III, 1979), authorizes grants to states for the establishment of comprehensive rehabilitation centers that "shall provide . . . to local governmental units and other public and private nonprofit entities located in the area such information and technical assistance (*including support personnel such as interpreters for the deaf*) as may be necessary to assist those entities in complying with this [Act], *particularly the requirements of section* [*504*]."[31] (Emphasis added.)

Along these same lines, new § 304(d), 29 U.S.C. § 774(d) (Supp. III, 1979), authorizes grants to public and private nonprofit institutions to establish 12 programs

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[30] Congress added this language to overrule a Justice Department interpretation that § 504 only applied to recipients of federal financial assistance, and not to the federal government itself. See 124 Cong. Rec. H3970 (daily ed. May 16, 1978) (remarks of Rep. Jeffords). Footnote 11 of the *Davis* decision took note of the fact that the amendment to § 504 specifically authorized regulations to implement only that amendment, and added: "The fact that no other regulations were mentioned supports an inference that no others were approved." 442 U.S. at 412 n. 11. But there was no issue in 1978 about the authority of HEW to issue regulations implementing § 504. See notes 21 & 22, *supra*. Accordingly, there was no need to mention that authority in amending § 504.

[31] This Court in *Davis* noted that § 305(a)(2) "recognizes that on occasion the elimination of discrimination might involve some costs . . . ." 42 U.S. at 411 n.10.

"[f]or the purpose of training a sufficient number of interpreters to meet the communication needs of deaf individuals." The Senate Committee Report explains that § 304(d) was enacted partially "in response to the requirements imposed by section 504 . . . ." S. Rep. No. 95-890, 95th Cong., 2d Sess. 41 (1978). In the House floor debate immediately preceding the vote on the 1978 Amendments, Representative Jeffords—a sponsor, minority floor manager, and conferee on the bill—elaborated on the purpose of § 304(d) as follows: "The provision in this conference report will establish 12 interpreter-training centers and interpreter pools within each State and help to alleviate these problems and *make section 504's nondiscrimination policies meaningful* as well as applicable to them." 124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978) (emphasis added).[32]

This Congressional understanding that implementation of § 504 required an availability of qualified interpreters to aid deaf persons is confirmed by the House and Senate floor debates immediately preceding the votes on the 1978 Amendments. Representative Jeffords' comments are typical:

> "As a result of Section 504, it has become clear to many that *504 means more than just removing architectural barriers for the physically handicapped.* While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. *People who are deaf*

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[32] Another 1978 amendment added § 315 to the Act, 29 U.S.C. § 777e(a) (Supp. III, 1979), which authorizes grants to "establish within each state a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals." And a new § 506(1), 29 U.S.C. § 794b(1) (Supp. III, 1979), was added to provide for technical assistance to any public or nonprofit agency, institution, or organization "for the purpose of assisting such persons or entities in removing architectural, transportation, or *communication* barriers." (Emphasis added.)

> *face communication barriers which are just as great as the architectural barriers faced by those in wheelchairs.*"

124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978) (emphasis added); see *id.* at H13471 & H13472 (remarks of Rep. Brademas, the bill's sponsor and majority floor leader). On the Senate floor, similar statements in support of these amendments were made. *E.g.*, 124 Cong. Rec. S15668 (daily ed. Sept. 21, 1978) (remarks of Sen. Hatch, a bill sponsor); *id.* at S15548 (remarks of Sen. Randolph, a bill sponsor), S15562 (remarks of Sen. Williams, chairman of the committee reporting out the bill), and S15576 (remarks of Sen. Javits, a bill sponsor) (daily ed. Sept. 20, 1978).

The above programs were thus clearly intended to help institutions meet what Congress understood were their obligations under § 504 to provide interpreters for deaf people. Representative Jeffords made clear, however, that the existence of federal funds to help implement § 504 would not relieve recipients of their responsibilities to comply with its requirements: "I must emphasize so that there is no misunderstanding that my insistence that the Federal Government pay part of the costs is in no way to negate or minimize the removal of barriers for the handicapped, or in any way to halt or delay action until the Federal Government puts up some money." 124 Cong. Rec. H13474 (daily ed. Oct. 14, 1978).[33]

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[33] See also § 306(a) of the Comprehensive Employment and Training Act of 1978, 29 U.S.C. § 876(a) (Supp. III, 1979), in which Congress found and declared that "due to the rapid implementation at programs to assist handicapped individuals *mandated under . . . section 504 . . .* there is a need for people to provide the *special supportive services . . . required by these Acts.*" Section 306(b), 29 U.S.C. § 876(b), provides for the establishment of programs to train personnel to assist the handicapped, specifically including "interpreters for the deaf and aides in classrooms." Subsequently enacted legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541 (1962); *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In these same floor debates, several Congressmen voiced their specific approval of HEW's regulations under § 504. Senator Williams, a sponsor of the bill and Chairman of the Committee reporting the bill, remarked:

> "With the signing of the regulations implementing section 504 of the Rehabilitation Act of 1973 by the Secretary of Health, Education, and Welfare, this administration has assured prohibitions on discrimination for persons with disabilities by anyone receiving Federal funds."

124 Cong. Rec. S15562 (daily ed. Sept. 20, 1978); see *id.* at S15567. Senator Javits, another of the bill's sponsors, in introducing an amendment on reader services, stated that "there is a great demand for such services, largely generated through the landmark Title V provisions of the Rehabilitation Act, which have now been put into effect under regulations of HEW." *Id.* at S15576. During the House floor debates, Representative Dodd declared that he "strongly supported the long-delayed issuance of the section 504 regulations, believing then, as now, that the protection they establish for the handicapped are very much needed." 124 Cong. Rec. H3974 (daily ed. May 16, 1978). Finally, Representative Jeffords also commented on the significance of the HEW regulations: "As a result of the regulations, *recipients of Federal dollars now had to do something* to make it possible for disabled people to be involved." *Id.* at H3969 (emphasis added).[34]

These expressions of approval of HEW's regulations are even more pertinent when viewed in light of the fact

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[34] It is significant that no expressions of disapproval were directed toward the HEW regulations here at issue. In 1974, Congress was not timid in expressing its disapproval of the Department of Labor's interim regulations under § 503 of the Act, 29 U.S.C. § 793 (1976). The Senate Report on the 1974 Amendments noted the Committee's "great disappointment with the Department of Labor's 'interim' regulations," and went on to state that it "hopes and expects that the Department will take the occasion to review and revise its regulations . . . ." S. Rep. No. 93-1139, 93d Cong., 2d Sess. 25-26 (1974).

that both houses of Congress considered the regulations in hearings just one year before these floor debates. The House Subcommittee on Select Education met in September 1977 "for the purpose of oversight hearings on [HEW] regulations issued earlier this year to implement Section 504 of the Rehabilitation Act of 1973, prohibiting discrimination against handicapped persons in federally assisted programs." *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the House Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 1 (1977) (opening statement of Rep. Brademas, chairman of the subcommittee). Each member of the Senate and the House previously had been provided with a copy of the HEW regulations to review at the time the regulations were issued. *Id.* at 73, 76. Representative Brademas stated at the outset of the House hearings:

> "With the publication of the regulations for Section 504, disabled people look forward to their rightful opportunity for full participation in our society. Central to the implementation of these regulations must be the realization that *what handicapped people want is access to programs. Inevitably, enforcement of and compliance with Section 504 will cause some readjustment problems. Costs may be incurred and modifications might be required.*"

Id. at 1 (emphasis added).[35]

All of this legislative history behind these substantial amendments of the Rehabilitation Act in 1978 compels

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[35] The testimony of the House implementation hearings was specifically noted in the House Report on the 1978 Amendments. H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 34 (1978). For the Senate hearings in 1977, see *Rehabilitative Extension Amendments of 1977: Hearings on S.1712 & S.1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 220, 480-81, 554-55, 726-27 (1977). For an example of the significance of Congressional awareness of HEW regulations prior to comprehensive revision of a statute, see *Board of Education* v. *Harris*, 444 U.S. 130, 149 (1979).

the conclusion that the § 84.44(d) auxiliary aid requirement of the HEW regulations is well within the scope of § 504, at least insofar as it commands recipient universities to provide and pay for interpreters for otherwise qualified deaf students.[36]

3. *Conclusion*

That the regulation at issue is "reasonably related" to the purposes of § 504—and is thus valid—is evident from both the language of the statute and its legislative history. Indeed, the provision of classroom interpreters for qualified deaf individuals is necessary to implement § 504 in the educational context, as HEW properly ruled by regulation. Although it was anticipated that the federal government at times would alleviate the costs of the necessary accommodations, Congress placed ultimate responsibility on the recipients of federal financial assistance. Section 84.44(d) effectuates the will of Congress, and its validity is beyond question in this case insofar as it was held to require the University to provide Camenisch with a classroom interpreter.

C. The Court of Appeals Decision Is Consistent with this Court's Decisions in *Davis* and *Lau* v. *Nichols*

1. *The* Davis *Decision*

The University relies upon this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), to support its position that § 504 was not intended to impose *any* financial obligations on recipient institutions. (Pet. Br. at 5-8). Accordingly, it asserts that any HEW regulations purporting to implement § 504 in a manner which requires *any* expense would constitute "affirmative action," and thus exceed the agency's lawful authority. (*Id.* at 6-10.) As the Court of Appeals cor-

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[36] When Congress comprehensively reviews and amends a statute, the legislative history of the amendments is to be accorded substantial weight in interpreting that statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); 2A C. Sands, *Sutherland Statutory Construction* §§ 49.09-49.11 (4th ed. 1973).

rectly decided in ruling for Camenisch, however, the *Davis* decision does not support the University's argument.

In *Davis*, a hearing-impaired woman was denied admission to the Associate Degree Nursing Program at Southeastern Community College because the college concluded that her handicap "could interfere with her safely caring for patients." 442 U.S. at 402. The Court held that she was not an "otherwise qualified person" within the meaning of the statute because she could not meet the college's "legitimate physical requirements." *Id.* at 406-07. The college's physical requirements were found to be legitimate because the ability to understand speech without reliance on lipreading was "necessary for patient safety during the clinical phase of the program" and "indispensable for many of the functions that a registered nurse performs." *Id.* at 407. Finally, the HEW regulations did not—and could not, in light of the purpose of § 504—require the University to make the "fundamental alteration in the nature of [the nursing] program" that would have been required to accommodate Davis. *Id.* at 410.

The distinctions between *Davis* and the present case are evident: Most important, it was stipulated below that Camenisch was a "qualified handicapped person" as defined by 45 C.F.R. § 84.3(k)(3) (1979). That is, he met "the academic and technical standards requisite to admission or participation in the recipient's education program or activity." *Id.*[37] In short, the University here has stipulated away the very issue that was at the heart of the *Davis* case.

To highlight this distinction, the ability to understand speech without lipreading was a necessary part of the clinical phase of the nursing program to which Davis

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[37] The Analysis accompanying the regulation makes clear that this definition is intended to be interchangeable with the statutory term "otherwise qualified handicapped person." (45 C.F.R. pt. 84, App. A at 379 (1979); pp. 48a-49a, *infra*.) Indeed, this Court quoted extensively from the regulatory definition and Analysis in *Davis* to support its holding. 442 U.S. at 406-07.

sought admission; but there is no contention in this case that the ability to understand oral communication without the assistance of an interpreter was a necessary or even important part of the Master's Degree program in which Camenisch was enrolled. Similarly, Davis's handicap prevented her from performing "many of the functions that a registered nurse performs" (442 U.S. at 407); but there is no contention that Camenisch's handicap would have prevented him from performing many of the functions of an individual with his Master's Degree.

In addition, the accommodations sought by Davis included "individual supervision by faculty members whenever she attends patients directly" and waiver of certain required courses. *Id.* at 407-08. Camenisch, on the other hand, did not seek any modification of the curriculum, any lowering of standards, or any individual attention from faculty members. Accordingly, while the Court in *Davis* stated that the applicable HEW regulations might not be valid if they required "the extensive modifications necessary to include [Davis] in the nursing program" (*id.* at 410), no such question arises in this case.

Finally, the Court in *Davis* found it to be reasonably clear that the applicable HEW regulations, 45 C.F.R. §§ 84.44(a) & 84.44(d) (1979), did *not* require the kind of modifications that would have benefited Davis. The University conceded in this case, however, that § 84.44 (d) does require an interpreter for qualified deaf students like Camenisch.

While *Davis* is distinguishable on all of the above grounds, the University points to specific language in that opinion as supporting its position. The Court stated that § 504 reflects "a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." 442 U.S. at 410. It concluded from this distinction that "neither the language, purpose, nor history of § 504 reveals an

intent to impose an affirmative action obligation on all recipients of federal funds." *Id.* at 411. Furthermore, the Court stated that the HEW regulations "would constitute an unauthorized extension of the obligations imposed by [§ 504]" if they "were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals." *Id.* at 410. No part of this analysis is inconsistent with the result reached below.

The Court in *Davis* pointedly stated that "[w]e do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear." *Id.* at 412. It specifically recognized the role of HEW in drawing this line by saying: "Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." *Id.* at 413.[38] In the present case, it is conceded that § 84.44(d) required the University to provide an interpreter for Camenisch, and HEW has made a specific finding on Camenisch's administrative complaint that the University's failure to provide a sign-language interpreter constituted illegal discrimination in violation of § 504. (See p. 66a, *infra.*)

The provision of a classroom interpreter under § 84.44 (d) may entail expenditures of money by a university, but as the Court in *Davis* noted, "on occasion the elimination of discrimination [under § 504] might involve some costs . . . ." 442 U.S. at 411 n.10. As has been shown above, this recognition fully comports with the legislative history of the original Act and the 1978 Amendments. Thus, there is no support in *Davis* for

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[38] In discussing HEW's rulemaking obligations under § 504, the Senate Report on the 1974 amendments to the Act recognized HEW's "experience in dealing with handicapped persons and with the elimination of discrimination in other areas . . . ." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974).

the University's argument that no financial outlay may be required under § 504. Such a reading of § 504 would render that statute of little value to the handicapped individuals it was designed to protect. As the language and legislative history of § 504 clearly show, Congress intended far more than such a hollow promise.

By contrast with the relief sought in *Davis*, § 84.44 (d) as applied here does not require any "substantial adjustments in existing programs." *Id.* at 410. (See pp. 29-30, *supra.*) Furthermore, there is no evidence in the record that the costs necessary to accommodate Camenisch and others like him need impose an "undue" financial burden on the University. See 442 U.S. at 412.[39]

Accordingly, the requirement of an interpreter for Camenisch is not "affirmative action" of a kind inconsistent with § 504. Rather, it is a reasonable requirement aimed at the elimination of discrimination against qualified handicapped individuals.[40] HEW's regulatory

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[39] A variety of outside funding sources are available to aid universities in providing classroom interpreters for otherwise qualified deaf students. While not pretending to be exhaustive, a list of such sources includes: (1) Vocational Rehabilitation (VR) agencies under Title I of the Rehabilitation Act of 1973, 29 U.S.C. §§ 720-51 (1976 & Supp. III, 1979), which requires state VR agencies to provide 11 basic vocational services, including interpreters for deaf individuals; (2) college work-study programs under § 441 of the Higher Education Act of 1965, as amended, 42 U.S.C. § 2751 (1976), the money of which can be used to pay nonhandicapped students to serve as interpreters, readers or notetakers; (3) funds to pay the costs of training personnel for handicapped children under §§ 631-35 of the Education of the Handicapped Act, 20 U.S.C. §§ 1431-35 (1976); and (4) funds for "special services for disadvantaged students," including the "physically handicapped" under § 417D of the Higher Education Act of 1965, as amended by the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1410 (Oct. 3, 1980), to be codified in 20 U.S.C. § 1070d-1b. The first three sources of alternate funding were available to the University when Camenisch requested an interpreter.

[40] The case of *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), is readily distinguishable. There, the Court held that a private employer need bear no more than a *de minimus* cost to

determination that interpreters are necessary to eliminate discrimination against the handicapped is directly supported by this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974).

2. *The* Lau *Decision*

In *Lau*, the Court construed § 601 of the Civil Rights Act of 1964 [41]—a provision that § 504 closely tracks and was patterned after. (See note 45, *infra*.) Non-English-speaking Chinese students brought suit against officials of the San Francisco Unified School District, seeking relief against the unequal educational opportunities caused by the school district's failure to remedy their language barrier. *Id.* at 564. These unequal educational opportunities were alleged to violate § 601 and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 564-65. No specific remedy was urged. *Id.* at 564.

A unanimous Court held for the students, relying solely on § 601 and not reaching the Equal Protection Clause argument advanced. *Id.* at 566. Discrimination was found because "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* The Court elaborated that "those

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accommodate an employee's religious preference under Title VII of the Civil Rights Act of 1964. *Id.* at 84-85. The Court stressed that to require the employer to bear additional costs in such accommodation would involve discriminatory unequal treatment of other employees on the basis of religion. *Id. Hardison* thus has no relevance to the present case. No First Amendment Freedoms are concerned here, and there is no assertion that providing Camenisch with an interpreter would have resulted in discrimination against anyone else.

[41] Section 601, 42 U.S.C. § 2000d (1976), provides: "No person of the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." *Id.* Having found such discrimination, the Court held that § 601 required the school district to undertake affirmative remedial efforts to rectify the language deficiency. *Id.* at 567-69, 570-71 (Stewart, J., concurring).[42] The case was remanded for the fashioning of appropriate relief. *Id.* at 569.

Lau reiterates the long-standing principle that was recently repeated by Justice Blackmun in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 407 (1978): "[I]n order to treat some persons equally, we must treat them differently." See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (Burger, C.J.). The parallels between the present case and *Lau* are inescapable.

Camenisch is a deaf individual who needed the services of an interpreter to effectively participate in his graduate program. (Stip. ¶ 10, J.A. 31.) His barrier, like that of the students in *Lau*, was one of communication. Merely providing him with the same facilities, instruction, and curriculum would not allow him an equal educational opportunity. His inability to hear guaranteed that, without an interpreter, his "classroom experiences [would be] wholly incomprehensible and in no way meaningful." *Lau* v. *Nichols*, 414 U.S. at 566. That it was proper to require the University to rectify this dis-

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[42] The HEW regulations and interpretive guidelines held valid in *Lau* as within the authority of § 601, 414 U.S. at 571 (Stewart, J., concurring), are much the same as the HEW regulation at issue here. *Compare id.* at 567-68 *with* § 84.44. The guidelines upheld in *Lau* required school districts to "take affirmative steps to rectify the language deficiency in order to open its instructional program to" students whose "inability to speak and understand the English language excludes [them] . . . from effective participation in the educational program offered . . . ." 414 U.S. at 568; 35 Fed. Reg. 11595 (1970).

criminatory impact, accordingly, follows directly from *Lau*.[43]

In sum, the Court of Appeals correctly construed *Davis* in ruling for Camenisch. In fact, both *Davis* and this Court's earlier decision in *Lau* support Camenisch's claim and the validity of the § 84.44(d) auxiliary aid regulation as applied to the facts of this case.

D. The Requirement that the University Provide a Classroom Interpreter Cannot Depend on the Financial Status of the Qualified Handicapped Individual

The fact that Camenisch did not meet the University's established criteria for financial assistance to graduate students, even with the expenses of the interpreter added in (Stip. ¶ 9, J.A. 31),[44] is of no consequence to the analysis under *Davis* or *Lau*. As indicated by both its terms and legislative history, § 504 is a civil rights provision designed to protect qualified handicapped individuals from discrimination. The statute is, in all relevant respects, akin to § 601 of the Civil Rights Act of

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[43] In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), Justice Powell explained the difference between the affirmative steps required in *Lau* and affirmative action. The preference approved in *Lau* "did not result in the denial of the relevant benefit—'meaningful opportunity to participate in the educational program'—to anyone else," while affirmative action does just that. *Id.* at 304 (quoting *Lau* v. *Nichols*, 414 U.S. at 568). In addition, in *Lau* "[n]o other student was deprived by that preference of the ability to participate," and this generally is not the case in affirmative action situations. *Id.* See also *Lloyd* v. *Regional Transportation Auth.*, 548 F.2d 1277, 1284 (7th Cir. 1977).

For a thoughtful discussion of the distinction between "affirmative action" and the "affirmative steps" that federal recipients may, in certain situations, be required to take under § 504, see Note, 13 Creighton L. Rev. 607 (1979).

[44] Neither the financial aid criteria employed by the University, nor the kind of aid that would have been provided to Camenisch had he met the criteria, are part of the record.

1964 and Title IX of the Education Amendments of 1972, neither of which has a means test.[45]

Given the nature and purpose of § 504, whether the University must provide interpreters to remedy a discriminatory practice cannot depend on the financial status of the handicapped individual against whom that practice works. It is clear that all qualified handicapped individuals are to be equally protected under § 504—the statute makes no wealth classifications. Moreover, it would be unprecedented to require a person subjected to discrimination to bear the costs of eliminating that discrimination. For instance, it was not suggested in *Lau* that the Chinese students pay for the affirmative remedial efforts required there. Nor has it ever been suggested that minority students pay the costs of compliance with desegregation orders or that women participating in mandated athletic programs pay the costs of these programs.

Furthermore, requiring Camenisch to provide his own classroom interpreter would act as a surcharge on his participation in the graduate program. Whereas hearing students pay only tuition and incidental expenses, Camenisch would have to assume these costs *plus* those of an interpreter in order to receive the same educational opportunity.[46] This surcharge on access for a "qualified

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[45] For the text of Title VI, see note 41, *supra*. Title IX, 20 U.S.C. § 1681(a) (1976), provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education programs or activity receiving Federal financial assistance . . . ." As the Senate Conference Report on the 1974 Amendments to the Rehabilitation Act explained, "[s]ection 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972 . . . ." S. Rep. No. 93-1270, 93d Cong. 2d Sess. 27 (1974).

[46] That other individuals are responsible for accommodating the costs of their own personalized needs (*e.g.*, eyeglasses, wheelchairs, etc.) is irrelevant to this "surcharge" argument. It is important to distinguish between general purpose aids like those noted parenthetically above, and educational access-specific aids like classroom interpreters, library readers, and the like. Only nonpayment for

handicapped individual" cannot square with the prohibitions contained in § 504.[47]

III. THE COURT OF APPEALS CORRECTLY HELD THAT § 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF

Whether § 504 confers a private right of action for injunctive relief need not be resolved in this case in light of *Maine* v. *Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980). *Thiboutot* held that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of *any* federal statutory right. *Id.* at 4860-62. Here, Camenisch has stated a cause of action for injunctive relief against the state university officials under 42 U.S.C. § 1983, alleging a deprivation of § 504 rights.[48] See also *Quern* v. *Jordan*, 440 U.S. 332, 338 (1979); *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974).

In any event, the Court of Appeals correctly held that § 504 confers a private right of action for injunctive relief. (616 F.2d at 131-32; Pet. App. A-6 to A-8.) This holding is consistent with the conclusion reached by all Courts of Appeals that have decided the issue.[49]

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the latter constitute a surcharge because these aids relate specifically and quite limitedly to program access. As discussed at p. 17, *supra*, § 84.44(d) expressly disallows the provision of general purpose aids. Camenisch never requested that the University provide him with an interpreter for other than classroom purposes.

[47] The HEW letter of finding on Camenisch's administrative complaint determined that "[t]he financial status of a qualified handicapped student is not an acceptable criteria for determining whether auxiliary aids will be provided." (See p. 67a, *infra*.)

[48] The University of Texas is established by the State and administered under State law. See Texas Education Code Ann. tit. 3, §§ 65.01 *et seq.*, 66.01 *et seq.*, 67.01 *et seq.* (Vernon, 1972 & 1980-81 Supp.).

[49] *Kling* v. *Los Angeles County*, No. 80-5371 (9th Cir. Dec. 8, 1980); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158

Moreover, this Court held in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), that Title IX of the Education Amendments of 1972 confers a private right of action. *Cannon* is especially applicable to the present case for at least two important reasons. First, § 504 "was patterned after, and is almost identical to . . . section 901 [Title IX] of the Education Amendments of 1972 . . . ." (See note 45, *supra*.) Second, the administrative procedures for enforcement under § 504 are identical to those used to enforce Title IX. See 45 C.F.R. §§ 84.61 & 84.71 (1979).

Even if *Cannon* is not viewed as dispositive, consideration of the factors identified in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), as relevant to determining whether a private remedy is to be implied shows that Congress intended § 504 to confer a private right of action in favor of qualified handicapped individuals.

First, § 504 was enacted for the benefit of qualified handicapped individuals, a class of which it has been stipulated that Camenisch is a member. (Stip. ¶ 8; J.A. 30.)

Second, the Rehabilitation Act and its legislative history show that Congress intended to create a private remedy under § 504. The Committee Report on the 1974 Amendments states that the

> "approach to implementation of Section 504, which closely follows [Title VI and Title IX] . . ., would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*"

(4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Auth.*, 548 F.2d 1277 (7th Cir. 1977).

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (emphasis added). This intent is confirmed by the addition of an attorney's fee provision to Title V of the Act in the 1978 Amendments, § 505(b), 29 U.S.C. § 794a (b) (Supp. III, 1979), and the legislative history in support of that section.[50] Furthermore, in *Cannon*, the Court found persuasive evidence of legislative intent to provide a private remedy in "that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action . . . ." 441 U.S. at 703. Similarly, when Congress patterned § 504 after Title VI in 1973, it was aware of court decisions finding a private right of action under Title VI.[51]

Third, the implication of a private right of action under § 504 is consistent with the underlying purposes of the legislative scheme. As the Court of Appeals concluded, the remedy provided by HEW, see 45 C.F.R. § 84.61 (1979), is not intended to provide a forum for program beneficiaries like Camenisch to press claims of discrimination against grant recipients. (616 F.2d at

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[50] In its brief, the University points out that § 504 is not mentioned in the Civil Rights Attorney's Fees Awards Act of 1976, which amended 42 U.S.C. § 1988. (Pet. Br. at 15.) The University does not discuss the attorney's fee provision in the Rehabilitation Act itself. The legislative history of this attorney's fee provision leads to the inescapable conclusion that Congress assumed a private right of action existed under § 504. S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978); 124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The Court in *Cannon* recognized the significance of a similar attorney's fee provision in ascertaining the legislative intent of Title IX. 441 U.S. at 685-86 n.6.

[51] Senate floor debate in 1978 on § 505(a)(2)—which applied VI rights and remedies to § 504 (see p. 22, *supra*)—reveals that Congress was keenly aware of judicial precedent on the private right of action issue. See 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978) (remarks of Sens. Bayh and Cranston).

135; Pet. App. A-16.) See *Cannon* v. *University of Chicago*, 441 U.S. at 706-08 n.41.[52]

Fourth, the cause of action is not one traditionally relegated to state law and in an area basically of concern to the state. The statute prohibits discrimination and applies to recipients of *federal* funds. See *id.* at 708-09.

Thus, all the *Cort* factors as applied to § 504 support the same result. Whether *Cannon* be viewed as dispositive or the factors in *Cort* be independently analyzed, § 504 creates a private right of action for injunctive relief for Camenisch to pursue against the University.

IV. RESPONDENT SUGGESTS THAT THE COURT OF APPEALS SHOULD HAVE DISMISSED THE APPEAL AS MOOT BECAUSE THE PRELIMINARY INJUNCTION WAS NO LONGER OPERATIVE

As a final matter, respondent believes that this case presents a jurisdictional question unrelated to the merits. The case has reached this Court after the University appealed pursuant to 28 U.S.C. § 1292(a)(1) from the grant of a preliminary injunction. That injunction required that the University "procure an interpreter or other effective method of making orally delivered course materials available to" Camenisch during the completion of his Master's degree at the University. (Pet. App. A-23.) As a condition of this relief, the District Court ordered Camenisch to post a $3,000 security bond. (*Id.* & J.A. 70.)

As ordered, the University provided Camenisch with an interpreter at its own expense (616 F.2d 127, 130; Pet. App. A-1), and he completed his degree requirements

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[52] For this same reason, added to the fact that the administrative process is extremely slow, it makes little sense to require exhaustion of administrative remedies prior to instituting a private action in federal court. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706-08 n.41, 708 n.42 (discussing HEW's heavy backlog of administrative complaints).

in August 1978. (See note 5, *supra.*) Thus, the preliminary injunction no longer had any force or effect as of that time. Despite these facts, the Court of Appeals ruled that a justiciable issue remained for its consideration because "issues raised by an expired injunction are not moot if one party was required to post an injunction bond." (616 F.2d at 131; Pet. App. A-6.) Respondent suggests that this ruling is an erroneous application of mootness doctrine to an appeal from a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

The University was not obliged to pursue its appeal of the expired preliminary injunction in order to obtain repayment from Camenisch under the injunction bond. The prevailing rule is that liability on a preliminary injunction bond is not determined until a case has proceeded to a final judgment.[53] This rule is consistent with the policy considerations behind injunction bonds. The statutory requirement of security is rooted in the belief that the defendant deserves protection against a court order granted without the deliberation that accompanies a full trial. Conversely, if the plaintiff ultimately prevails on the merits, his obtaining of interlocutory relief did not unfairly damage the defendant. Accordingly, the protection offered by the injunction bond "consists of a promise that the defendant will be reimbursed for losses suffered if it turns out that the order issued was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation."[54] Even if the issuance of a preliminary injunction is reversed on appeal, the defendant is required to await both final judg-

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[53] See Wright & Miller, 11 *Federal Practice and Procedure* § 2972 at 648 (1973); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333, 340 (1959); Note, *The Triggering of Liability on Injunction Bonds*, 52 N.C.L. Rev. 1252, 1265 (1974).

[54] *American Bible Society* v. *Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971); Note, *supra*, 73 Harv. L. Rev. 333, 336 (1959).

ment and the completion of all subsequent appeals before recovering on the injunction bond.[55]

The law is clear that an interlocutory injunction order may become moot while the underlying controversy between the parties is not.[56] If a preliminary injunction order is moot—because, as here, the injunction has expired—then the purpose of an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) has been lost. That statute is an exception to the general federal policy "against piecemeal appeals," *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966); its purpose is to permit litigants "to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955).

Accordingly, the reliance of the Court of Appeals on "the traditional rule that issues raised by an expired injunction are not moot if one party was required to post an injunction bond" (616 F.2d at 131; Pet. App. A-6), does not respond to the jurisdictional problem. Certainly,

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[55] Note, *supra*, 52 N.C.L. Rev. 1252, 1265 (1974). Thus the University appears to err in stating that the bond was posted "in order that the Petitioner might be reimbursed in the event that the order of the District Court was set aside on appeal." (Pet. Br. at 4.) The language of the bond (J.A. 70) does not reflect any intention to change the prevailing rule.

[56] *E.g.*, *Western Electric Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203, 1207-08 (5th Cir. 1978) (appeal from denial of injunctive relief mooted by administrative action requiring conduct sought by plaintiff; damage issue not moot); *Washington Metropolitan Area Transit Auth.* v. *Amalgamated Transit Union*, 531 F.2d 617 (D.C. Cir. 1976) (appeal from preliminary injunction against strike mooted by agreement ending labor dispute; appeal from contempt judgment not moot); *O'Brien* v. *Fackenthal*, 284 F. 850 (6th Cir. 1922) (appeal from temporary injunction mooted by cessation of strike; right to permanent injunction and damages, pending below, not moot). See also *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 371 (1960) (appeal from final state-court injunction moot because injunction expired and separate proceeding below on penalties was pending).

if a court later determines that there was no right of action or that the complaint did not state a claim, then a defendant who has been preliminarily enjoined will prevail on the merits and become entitled to damages under the injunction bond. But an interlocutory appeal from a ruling denying dismissal of the complaint on such threshold issues—as in effect occurred here—can be taken only under 28 U.S.C. § 1292(b) or in connection with an appeal from a preliminary injunction order under 28 U.S.C. § 1292(a)(1).[57] When the preliminary injunction is moot, however, the underpinning of the § 1292(a)(1) appeal has been lost.[58]

This is not a situation in which the issues raised by the University are "capable of repetition, yet evading

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[57] On interlocutory appeal of an injunctive order, the scope of review often extends to threshold issues on the merits, such as failure to state a claim. See Wright, Miller, Cooper & Gressman, 16 *Federal Practice and Procedure* § 3921 at 16 *et seq.* (1977).

[58] The two cases relied on by the Court of Appeals for finding the appeal not moot are distinguishable. In *Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), a state-court *permanent* injunction against construction site picketing was affirmed by the state appellate court, although construction had been completed by the time it ruled. This Court ruled that the state court had no power to enter the injunction, because of federal labor law. It held that the appeal from the injunction was not moot, because petitioners (defendants below) would have had no recourse under the injunction bond unless the permanent injunction was reversed on the appeal, In short, unlike here, the underlying issues would never have been addressed.

In the other case relied on by the Court of Appeals, *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978), the Court reviewed the grant of a preliminary injunction even though the injunction had been stayed pending appeal and the need for injunctive relief had passed. The Court's principal ground for reaching the merits, however, was that there was a "near certainty" that the act complained of would be repeated and thus result in further requests for injunctive relief. Although it observed that liability on the bond required in connection with the stay pending appeal remained to be adjudicated—so that the "case" was not moot—it did not state that this factor alone would have justified ruling on the appeal.

review." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *DeFunis* v. *Odegaard*, 416 U.S. 312, 319-20 (1974). The substantive isues are capable of repetition, but their review is ensured in this very case on the merits or on liability under the injunction bond, or in a subsequent action brought by a handicapped student who is more than a few months away from graduation or, finally, in a class action encompassing current and prospective handicapped students.

For all of these reasons, we suggest that the Court of Appeals erred in failing to dismiss the University's appeal as moot.

CONCLUSION

For the foregoing reasons, we request this Court to affirm the judgment below. If the Court finds the appeal to be moot, for the reasons in Part IV, *supra*, it should vacate the judgment of the Court of Appeals and remand with directions to dismiss as moot.

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Appendices

APPENDIX A

Sections 504 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 & 794a (Supp. III, 1979)

29 U.S.C. § 794:

Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(Pub. L. 93-112, title V, § 504, Sept. 26, 1973, 87 Stat. 394, as amended Pub. L. 95-602, title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)*

29 U.S.C. § 794a:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964

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* The 1978 amendment added the words after "Federal financial assistance" in the first sentence and added the second and third sentences.

(42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93-112, title V, § 505, as added Pub. L. 95-602, title I, § 120, Nov. 6, 1978, 92 Stat. 2982.)

APPENDIX B

HEW Regulations, 45 C.F.R. pt. 84 (1979)

PART 84—NONDISCRMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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APPENDIX A—ANALYSIS OF FINAL REGULATION

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

SOURCE: 42 FR 22677, May 4, 1977, unless otherwise noted.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "'Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j) (1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j) (2) (i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to any agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandcipped persons from the benefits of a program limited by Federal statute or executive order to handi-

capped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure non-discrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is ex-

tended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b) (2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposed to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exer-

cises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c) (1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary education institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applications, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification

shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class or such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of

qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test ascore or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when

administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept

confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§ 84.15—84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be ex-

cluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternative accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a sig-

nificant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including

persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility construted by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accesible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)).[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

§§ 84.24—84.30 [Reserved]

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[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b) (1) (i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if

the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person's and the parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in

the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33 (b) (1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a receip-

ient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6 (b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b) (2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education pro-

grams or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in

Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner

that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to pro-

vide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55—84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6-80.10 and Part 81 of this Title.

[42 FR 22677, May 4, 1977; 42 FR 22888, May 5, 1977]

§§ 84.62—84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

[42 FR 22677, May 4, 1977; 42 FR 22888, May 5, 1977]

APPENDIX C

HEW Analysis, 45 C.F.R. pt. 84, App. A (1979)

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient"*. Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipient whose sole source of Federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's

regulations implementing title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance"*. In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts. In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the

Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistenly been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person"*. Section 84.3(j), which defines the class of persons protected under the regulation, has been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it re-

sults in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning dis-

abilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j) (2) (i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j) (2) (iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hos-

pitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office of Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person."

Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an

employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must

be met by applicants to these programs. The term "technical standards" refers to all nonacademic admission criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b) (1) (i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b) (2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhadicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b) (2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b) (3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b) (1) (v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b) (1) (vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b) (5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is

not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo*, 411 F.Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols*, *supra*.

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1)

include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraphs (c) (2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures

are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinatd with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8(a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicaped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10(a) states that compliance with the regulation is not excused by

state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

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SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicappped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84-42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons, this was not the intent of the provision and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program, would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be ac-

cessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers

in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptioins by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the

needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42 (b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using exist-

ing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing avail-

able to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such asistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under will, trusts, or similar legal instruments in a discriminatory manner are permisisble, but only if the overall effect of the recip-

ient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

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SUBPART G—PROCEDURES

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

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[42 FR 22677, May 4, 1977, as amended at 44 FR 17168, Mar. 21, 1979]

APPENDIX D

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

REGIONAL OFFICE
1200 Main Tower Building
Dallas, Texas 75202

Office for Civil Rights

Ref. #780041
#792062

January 24, 1980

Mr. Marc P. Charmatz
Litigation Attorney
The National Association of the Deaf
Legal Defense Fund
P.O. Box 1793
7th Street & Florida Avenue, N.E.
Washington, D.C. 20002

Subject: *Camenisch* vs. *University of Texas at Austin*

Dear Mr. Charmatz:

The investigation of the allegations against the University of Texas at Austin (UTA) raised by Mr. Walter Camenisch has been completed. Our findings are directed to you since Mr. Camenisch has designated you as his legal representative.

An on-site investigation was conducted by Dr. Marta Olchyk on March 19-21, 1979. Based on the results of that investigation, we have concluded that UTA is in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with

impaired sensory skills, thus denying handicapped students equal educational opportunities.

Our investigation revealed that Mr. Camenisch is a qualified handicapped individual as defined by the implementing regulation of Section 504 of the Rehabilitation Act of 1973. Mr. Camenisch, as well as other deaf graduate students, requested that UTA provide funds for the payment of a qualified interpreter for the purpose of assuring them full participation in classes at that institution. We have determined that the requested interpreter services were necessary for Mr. Camenisch to fully participate in the educational porgram in which he was enrolled. Mr. Camenisch was denied such services verbally and in writing by the UTA administrators. The basis cited for the denial was the University's financial needs criteria.

45 CFR, Section 84.44(d) of the Regulations implementing Section 504 of the Rehabilitation Act of 1973 provides:

> Auxiliary Aids: (1) A recipient to which this subpart applies shall take such steps as necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under any educational program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

Therefore, use of a financial needs criteria in determining whether the necessary aids will be provided to a sensory impaired handicapped student is in violation of the above quoted paragraph. The financial status of a qualified handicapped student is not an acceptable criteria for determining whether necessary auxiliary aids will be provided.

Based on the above, our office requested that UTA develop and submit to us a specific plan which will correct this violation within 15 working days of the date of this letter.

A copy of the letter of finding sent to UTA will be made available to you upon request.

We would like to thank you and Mr. Camenisch for the cooperation provided to us while conducting this investigation. You will be informed of the status of the case.

Sincerely,

/s/ Taylor D. August
TAYLOR D. AUGUST
Director, Region VI

cc: Walter Camenisch

MOTION FILED
JAN 30 1981

No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, *et al.*,

Petitioners,

—v.—

WALTER CAMENISCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE CHILDREN'S RIGHTS PROJECT, THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN COUNCIL OF THE BLIND, AND THE CENTER FOR LAW AND EDUCATION, *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE

The American Civil Liberties Union, its Children's Rights Project, The New York Civil Liberties Union, The American Council for the Blind, and the Center for Law and Education, hereby respectfully move for leave to file the attached brief amici curiae. The consent of the attorney for respondent has been obtained. The consent of the attorney for petitioner was requested but refused.

The American Civil Liberties Union is a nationwide, non-partisan organization of over two hundred thousand members, dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project is a special project of the ACLU dedicated to asserting and defending the rights of children. The

New York Civil Liberties Union is a state affiliate of the ACLU, operated in New York State.

The ACLU and its affiliates and the Children's Rights Project have a deep interest in protecting the Constitutional and statutory rights of handicapped individuals, including rights secured by the Rehabilitation Act of 1973, 29 U.S.C. 790, et seq. In the belief that judicial involvement is necessary to secure the rights of handicapped individuals, the ACLU has represented the plaintiffs in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Willowbrook case, NYSARC v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975), and petitioner in Trageser v. Libbie Convalescent Home, cert. denied, 442 U.S. 947 (1979).

The American Council of the Blind is a nationwide membership organization with sixty-one state and national affiliates. The majority of the Council members are blind and visually impaired persons, who as a class will be directly affected by the outcome of this important case. The Center for Law & Education is the national support center on education issues for legal services programs and is funded and staffed specifically to assist and participate in litigating education cases. The Center has served as counsel in a broad range of education cases, including cases challenging discrimination in schools on the basis of race, handicap, and denial of other student rights.

Because this case raises important questions concerning the implementation

of rights secured by the Constitution and the Rehabilitation Act, amici respectfully urge this Court to accept and file the enclosed brief amici curiae.

Respectfully submitted,

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January 27, 1981

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INTEREST OF AMICI

The Interest of Amici is set forth in the foregoing motion.

STATEMENT OF THE CASE

This case involves the refusal of the University of Texas at Austin, a state university supported by more than $30,000,000 in federal funds, to make any accommodation whatever to meet the needs of Walter Camenisch, a deaf graduate student, who could not participate in his classes or obtain the job he had been promised by the Texas School for the Deaf upon completion of his degree without the assistance at the University of a sign interpreter, or transcribed lectures, or other special aid. Camenisch contends that Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the regulations lawfully

promulgated by the Department of Health, Education and Welfare pursuant thereto require the University to provide such services. The District Court agreed and, because the University refused to suggest any less expensive or more administratively convenient means to provide Camenisch with access to his classes, ordered the University to provide Camenisch with a part-time sign interpreter, at a total cost of approximately $1,200.[1] The Fifth Circuit upheld that ruling.

Few facts in this case are in dispute, but some deserve special emphasis. The

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[1] The actual cost does not appear in the record, but we are advised by counsel that the University, which provided the services as ordered under a $3,000 bond, actually spent a little more than a third of the bonded amount.

University of Texas has stipulated that it received at least $31,400,000 of federal financial assistance, 15.5% of its annual budget, during the year Camenisch requested the University to comply with HEW Regulations. Moreover, the University of Texas stipulated that Camenisch is, within the meaning of § 504, a qualified handicapped person. While he was in the University's graduate school, Camenisch was also employed as acting dean at the Texas School for the Deaf, and his continued employment was contingent upon his securing a Master's Degree.

Prior to the District Court's decision, the Department of Health, Education and Welfare issued a letter of findings supporting Camenisch and rejecting each of the University's

arguments for refusing to provide the auxiliary aids Camenisch needs and the applicable federal regulations require. The agency's findings were wholly in accord with the Assurance of Compliance the University had earlier signed with HEW in which it promised to comply -- in all its programs and activities -- with § 504 and the regulations lawfully promulgated thereunder.

SUMMARY OF ARGUMENT

The legislative history of the Rehabilitation Act demonstrates that Congress intended to permit handicapped persons to sue to enforce rights guaranteed in § 504 of the Rehabilitation Act, a conclusion amply supported by this Court's decisions in Cannon v. University of Chicago, 441 U.S. 677 (1979), University

of California v. Bakke, 438 U.S. 265 (1978), and Lau v. Nichols, 414 U.S. 563 (1974). Point I.

The decision reached by both courts below did not unlawfully require the University to extend affirmative action to the handicapped. Instead, following this Court's teaching in Southeastern Community College v. Davis, 442 U.S. 397 (1979), the district court found, and the Court of Appeals agreed, that the University had discriminated against respondent by its unjustified refusal to make its oral instruction available to him in contravention of § 504 and valid HEW regulations. The relief ordered and affirmed was properly non-intrusive, and fully consistent with those regulations. The holding that identical treatment was in these circumstances discriminatory within the meaning of the Rehabilita-

tion Act is fully supported by cases in this Court. See, e.g., Lau v. Nichols, supra; Griggs v. Duke Power Co., 401 U.S. 424 (1971). Point II.

The question whether respondent met his burden of showing that § 504 applied to the University in this case is not before the Court, since petitioner failed to raise the point below. In any event, § 504 imposes no burden on plaintiffs of demonstrating "program specificity," as every court to reach the question has agreed, and as the decision in Southeastern Community College indicates. Moreover, even were this Court to doubt that this is so, the University's failure to make a record on the issue, or even to assert that the undefined "program" respondent completed was not federally funded, counsels against reversal of the Court

of Appeals on this issue, and suggests at most a remand for development of the record. If the case is remanded for this purpose, the Court should make clear, in accordance with ordinary principles of common law, that the University, which alone has access to the information in question, carries the burden of demonstrating that the relevant program is not federally funded. Point III.

ARGUMENT

I. SECTION 504 OF THE REHABILITATION ACT OF 1973 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION.

By enacting the Rehabilitation Act of 1973, Congress intended to make "participation in society more feasible for handicapped individuals." S. Rep. 93-318, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Adm. News

2076, 2092. Virtually every federal court to consider the question presented here has concluded that a private right of action on behalf of handicapped individuals against those who have discriminated on the basis of handicap is necessary, proper "and intended" under § 504 of the Rehabilitation Act. That conclusion, endorsed by the Fifth Circuit in this case, 616 F.2d at 131, is entirely consistent with the reasoning of this Court's decisions in Cannon v. University of Chicago, 441 U.S. 677 (1979) and Cort v. Ash, 422 U.S. 66 (1975), where the standards for implying private rights of action were set forth.

A. Congress Intended That Section 504 Rights Be Enforced by Private Actions.

The Rehabilitation Act, as enacted in 1973, read in relevant part as follows:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. § 794.

Although the original act contained no express grant of a private cause of action, in framing the language of § 504, Congress chose precisely the same words as Title VI of the Civil Rights Act, which, as Congress was well aware in 1973, had already been repeatedly held to confer a private right of action upon aggrieved individuals.[2] Legislative

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[2] The lower federal courts have agreed that a private right of action should be implied under Title VI. See, e.g., Bossier Parish School Board v. Leman, 370 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 911 (1967); Natonabah v.

history accompanying the Act made clear that Congress intended a private right of action under § 504.[3]

Moreover, in twice amending the original Rehabilitation Act, in 1974 and 1978, Congress twice reiterated and clarified its intention to create a private right of action under § 504. The 1974 and 1978 Amendments should be accorded great weight when interpreting Congressional intent. See Red Lion Broadcasting Co. v. FTC, 395 U.S. 367, 380-81 (1969).

Board of Education, 355 F. Supp. 716, 724 (D.N.M. 1973). This Court has held specifically that Congress was aware of the many cases concerning private causes of action under Title VI as of 1972, that is, a year before the enactment of § 504. Cannon v. University of Chicago, supra at 575-76.

[3] See generally Brief for the American Civil Liberties Union et al. Amici Curiae in Southeastern Community College v. Davis, No. 78-711, at 6-15.

Congress first amended the Rehabilitation Act in 1974. The committee report to the Senate concerning that amendment states:

> This approach to implementation of Section 504, which closely follows [Title VI] would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal Government as well as relative ease of implementation and permit a judicial remedy through a private action. (Emphasis supplied).

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40, reprinted in 1974 U.S. Code Cong. & Admin. News 6373, 6391.[4]

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[4] Congress was especially concerned about advancing educational opportunities for handicapped people. The Senate Labor and Public Welfare Committee stated in its Report:

> Special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education. These individuals, young adults and adults alike, must be afforded equal opportunity and access to higher educational services. The

By 1978, the year Walter Camenisch brought this case, when Congress again amended the Act, the issue of the existence of a private right of action was thought to be so well settled that the only open question was whether private litigants were entitled to attorneys' fees in § 504 cases. Congress again voted to treat § 504 the same as other civil rights statutes, and provided for the award of attorneys fees, Section 505a, 29 U.S.C. § 794a, action which is inexplicable except on the understanding that Congress had previously created a private right of action. Moreover, § 794a(a)(2), which was added in the 1978 amendments, Pub. L. 95-1149, now expressly provides:

> Committee is aware that at the present time most of these avenues are not open to individuals with handicaps. . . .

S. Rep. No. 1297, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 6408 (emphasis added).

> "The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under Section 794 of this title."

The regulations promulgated by HEW to implement § 504 are similarly explicit. Under 34 C.F.R. § 104.61, "The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part."

B. This Court's Decision in Cannon v. University of Chicago Confirms the Existence of a Private Right of Action.

Despite the fact that in Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979), this Court formally reserved the question whether § 504 provides a private right of action, the Court's decision in Cannon v. University of Chicago,

441 U.S. 677 (1979), effectively put to rest any lingering doubt as to the existence of a private cause of action under § 504.

In Cannon, the Court noted the near identity between Title IX, the act it was considering, and Title VI,[5] the similarities in the provisions for the administrative resolution of disputes between the two titles, the fact that the intention of the legislative scheme was "to avoid the use of federal resources to support discriminatory practices . . . [and] . . . to provide individual citizens effective protection against those practices," and

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[5] Section 601, 42 U.S.C. § 2000d, which provides:

> "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

the fact that the federal government has been the primary guarantor of individuals against all forms of discrimination since at least the Civil War. The Court also noted that Congress was charged with knowledge of earlier judicial decisions implying a private cause of action under Title VI at the time it enacted Title IX. On the basis of these considerations -- all of which apply with at least equal force to § 504 -- the Supreme Court implied a private cause of action under Title IX.

In Cannon, this Court clearly indicated its preference for Congress to speak explicitly when it wishes to create a private cause of action,but it also made clear that

> the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy

available to the person benefitted by its legislation.

441 U.S. at 717. As demonstrated above, the intentions of Congress concerning § 504, particularly those articulated at the time of the 1978 Amendments, are even clearer than its intentions concerning Title IX. Therefore, Cannon decides this issue a fortiori.[6]

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[6] See also Lau v. Nichols, 414 U.S. 563 (1974) where this court recognized a private action under Title VI and permitted private persons to challenge the failure of the San Francisco School District to offer classes in the Chinese language to Chinese speaking children. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four Justices of this Court found an implied right of action under Title VI; four others assumed it for purposes of that case. The Courts of Appeal have unanimously agreed that the Rehabilitation Act creates a private cause of action. See Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir. 1977); National Association for the Advancement of Colored People v. The Medical Center, Inc., 599 F.2d 1247, 1258-59 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d

In sum, the Congressional intent to provide a private right of action for handicapped persons under Section 504 is clear, and the Fifth Circuit's decision is in complete harmony with this Court's prior decisions in Cannon v. University of Chicago, supra, and Lau v. Nichols, supra, which recognized private rights of action under Title IX and Title VI, the intended analogs of Section 504.[7]

1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Lloyd v. Illinois Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); Adashunas v. Levy, 626 F.2d 600, 603 (7th Cir. 1980); United Handicapped Federation v. Andre, 558 F.2d 413, 415 (8th Cir. 1977).

7 Even if this Court held that Section 504 creates no private right of action, Camenisch could bring his claim in district court under 42 U.S.C. § 1983 against a state public educational institution to redress an alleged deprivation of the rights, privileges, and immunities secured by the laws of

II. THE COURT OF APPEALS CORRECTLY CONSTRUED THIS COURT'S DECISION IN SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS, THE STATUTE, AND THE RELEVANT REGULATION, IN ORDERING THE UNIVERSITY OF TEXAS TO PROVIDE A SIGN INTERPRETER

The District Court's order in this case, affirmed by the Circuit Court, is unequivocally among the numerous possible remedies for deprivation of a deaf student's access to academic classes contemplated by regulations implementing the rights

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the United States. In Maine v. Thiboutot, ____ U.S. ____, 100 S.Ct. 2502 (1980), this Court held that § 1983 entitles an individual to bring suit for violations of federal statutes, such as Section 504, a question which had been reserved in Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979).

In his dissenting opinion in Thiboutot, Justice Powell argued that § 1983 only encompasses civil rights statutes, not all statutory claims. Even under this narrower interpretation, Mr. Camenisch could sue under § 1983, because Section 504 is a civil rights statute.

granted in Section 504. In its brief and certiorari petition to this Court, the University of Texas has attempted to mislead the Court by arguing that the Fifth Circuit incorrectly applied Southeastern Community College v. Davis, and to further confuse the issue by erroneously equating "affirmative action" with the steps necessary to ensure equality of treatment for handicapped persons. This case, however, is not about affirmative action but rather the finding of two courts below that the University discriminated against respondent by its unjustified refusal to extend the reasonable accommodation required by HEW regulations to effect the equality for qualified handicapped persons in higher education which it

was Congress' clear intention to insure.[8]

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[8] The Rehabilitation Act provides both that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in" a covered program, and that no such individual "shall, solely by reason of his handicap, . . . be subjected to discrimination under" any covered program. 29 U.S.C. § 794, quoted supra at 9. The Court has not previously decided whether there is any difference in coverage between those prohibitions, although Southeastern Community College might be read to indicate that there is not. See 442 U.S. at 400, 412. In any event, because Camenisch has been "discriminated against" within the meaning of Southeastern Community College, we have addressed this brief solely to that test, even though it is clear that he has also been "excluded from participation" in covered programs as well.

A. The Court of Appeals Correctly Construed This Court's Decision in Southeastern Community College v. Davis

The University of Texas mischaracterizes the issue in this case by asserting that the courts below failed to heed this Court's decision in Southeastern Community College v. Davis. The Fifth Circuit did not misconstrue this Court's decision in Davis, however, but correctly distinguished the instant case by applying the analysis undertaken in Davis.

In Southeastern Community College, this Court held that Mrs. Davis failed to meet the legitimate and necessary physical requirements of the college's nursing program, and hence was not an "otherwise qualified handicapped individual" within the meaning of Section 504. 442 U.S. at 407. This Court further found that none

of the modifications and auxiliary aids authorized by the HEW regulations could accommodate Mrs. Davis's handicap to enable her to participate in the program and become a registered nurse. 442 U.S. at 409.

By stark contrast, both courts below found -- and even the University of Texas has stipulated -- that Walter Camenisch is an otherwise qualified handicapped student, within the meaning of § 504, who despite his handicap could both participate successfully in his classroom activities with an interpreter or other educational aid, and perform well in a job as Dean of Students at the Texas School for the Deaf that his degree would guarantee.

Because Mrs. Davis did not meet the threshold requirement of being an "otherwise qualified handicapped" person

within the meaning of Section 504, this Court did not, and could not, decide in that case the degree of accommodation Section 504 requires for persons like Mr. Camenisch, who is within the scope of the Act. The Fifth Circuit's holding that the University of Texas was obligated to provide a sign language interpreter was not inconsistent with this Court's holding in Davis, and was squarely based on the duly promulgated HEW Regulations pursuant to § 504. As Davis expressly recognized,

> "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. . . .
>
> identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsiblity of HEW." 442 U.S. at 412-13.

The relief requested in Davis involved major restructuring of the clinical portion of an academic program. No such restructuring is necessary here, and affording Camenisch the accommodation would not change the program as it affected other students in any respect. Camenisch could participate in the graduate program as given, if a sign language interpreter or other educational aid were provided to give him access to classroom lectures.

B. Valid HEW Regulations Require the University of Texas to Provide an Interpreter.

The regulations at issue in this case were duly authorized by the Rehabilitation Act, and promulgated by the Department of Health, Education and Welfare. They are explicit and unequivocal

in their requirement that colleges and universities are obliged to make oral lectures available to deaf students. 34 C.F.R. § 104.44(d) provides, under the title "Auxiliary Aids," that

> (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
>
> (2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually

> prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

Moreover, in addition to the clear meaning of the regulations themselves, recipient institutions are guided by "Comments" explaining the regulations under which this case was decided. At 34 C.F.R. § 104, Appendix A, HEW reiterated that one method for complying with 34 C.F.R. § 104.44(d) was provision of interpreters for deaf students.[9] The

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[9] In discussing and recommending ways which colleges and universities such as the University of Texas could defray the cost of providing interpreters, the regulations clearly established a duty of the university:

> Under § 104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern

preliminary relief ordered by the district court in this case mirrored these regulations, by requiring the University of Texas

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about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

> "to procure an interpreter or other effective method of making orally delivered course materials available to Plaintiff. . . ."

Camenisch v. University of Texas, [1978] 16 EPD (CCH) ¶ 8836 (W.D. Tex. May 17, 1978) (emphasis added). In short there can be no question that the relief ordered and affirmed in this case is precisely the relief contemplated by the applicable regulations.[10]

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[10] Thus, the issue raised by the University in this Court, whether the district court improperly construed the Act to require the University to assume undue financial and administrative burdens by furnishing an interpreter for Camenisch, is not presented by this case, because the district court did not do so. To the contrary, the order entered was as non-intrusive as possible, requiring only that the University procure some "effective method of making orally delivered course materials available to Plaintiff. . . ." In the absence of a showing by the University that the state and private assistance HEW had found could be

Thus, the only legal question for this court to resolve is whether the regulations are valid, and this is a question which has nothing whatever to do with this Court's decision in Southeastern Community College v. Davis. As noted above, the regulations were authorized by Congress, in the 1974 Amendment to the Rehabilitation Act,[11] and

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utilized was unavailable, or detailing the financial and administrative expense which the University will have to bear, the record would not support finding the district court's order burdensome or unreasonable.

[11] S. Rep. No. 93-1297, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 6390. Congress further expressed the intent that the regulations be implemented by the end of 1974. Id. at 6391.

they were the result of a particularly careful and extensive rule-making process.[12] All of this, moreover, occurred pursuant to a specific Executive Order, directing the

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[12] Over three hundred written comments were received in response to HEW's Notice of Intent to Issue Proposed Rules. 41 Fed. Reg. 20296 (May 17, 1976). The written comments were supplemented by a series of ten meetings conducted by HEW at various locations across the country. On July 16, 1976, the Department published a Notice of Proposed Rulemaking, analyzing the public comments received on the critical proposed regulation for further public comments. 41 Fed. Reg. 29549 (1976). A total of more than 850 comments were received and analyzed. An additional 22 public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulations and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the written comments.

Department of Health, Education and Welfare to "coordinate the implementation of Section 504 by all federal departments and agencies, adopt rules and regulations and issue orders deemed necessary."[13]

As this court most recently held in Chrysler Corp. v. Brown, 441 U.S. 281 (1979) "properly promulgated, substantive agency regulations have the force and effect of law." See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Foti v. Immigration and Naturalization Serv., 375 U.S. 217 (1963); United States v. Mersky, 361 U.S. 431, 437-38 (1960); Atchison, T & S.F.R. Co. v. Scarlett, 300 U.S. 471, 474

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13 On numerous occasions this Court has determined that administrative interpretations of a statute by the enforcing agency are entitled to "great deference." E.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

(1937). The University has not alleged that the regulations which decide this case fail in any of these regards. Instead, its position apparently is that a covered program would not violate the statute if each otherwise qualified handicapped individual were permitted to participate and required to provide any necessary accommodations at his own expense. But that is not how HEW has interpreted the statute through its regulatory authority, and unless its interpretation is contrary to the statute, it must be honored. In light of this Court's express recognition in Southeastern Community College that the statute forbids, in certain circumstances, the "refusal to accommodate the needs of a disabled person" without undue burden, 442 U.S. at 413, HEW was well within its

statutory authority in rejecting the University's proposed rule. As the Seventh Circuit observed in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) with regard to public transportation:

> There is no equality of treatment merely by providing the handicapped with the same facilities as ambulatory persons . . . ; for handicapped persons who cannot gain access to such facilities are effectively foreclosed from any meaningful public transportation. 548 F.2d at 1284.

Similarly in public education, to provide a handicapped student with the exact same facilities, and not make the reasonable adjustments that make the access meaningful, is to effectively foreclose him from education. Lau v. Nichols, 414 U.S. at 566 ("there is no equality of treatment merely by providing [non-English speaking]

students with the same facilities, textbooks, teachers, and curriculum. . . .").

The idea that identical treatment may constitute statutorily defined "unequality" thereby necessitating differential treatment as a remedy, has a long and distinguished history in this Court. As the Chief Justice wrote in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e,

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one that all seekers can use.

See also Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J.,

dissenting) ["There is no greater inequality than the equal treatment of unequals."][14]

In a number of cases like that before this Court, lower courts have correctly found discriminatory and therefore illegal the arbitrary and unjustified refusal to make adjustments (which do not impose undue financial or administrative burdens) to provide otherwise qualified handicapped

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[14] Providing both the rich and the poor the "opportunity" to rely on appellate transcripts has been deemed unequal treatment. Griffin v. Illinois, 351 U.S. 12 (1956). The University's argument here requires that the otherwise qualified handicapped accommodate themselves to its rules in precisely the manner which this Court has consistently held discriminatory.

persons the opportunity to participate in covered programs.[15] These decisions are consistent with Title VI cases which have required far more substantial changes in public schools and public housing than are at issue in this case.[16] And, as already noted, Title VI provides the model for enforcing Section 504.

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[15] Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (adapting mass transit vehicles to accommodate mobility impaired persons); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977) (adapting mass transit vehicles); Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wisc. 1977) (mass transit vehicles); Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va. 1976) (accommodate handicapped child in regular public classroom). Moreover the 1978 Amendments to the Rehabilitation Act authorize funds to assist federally-aided programs to accommodate the handicapped, 29 U.S.C. § 775(a)(1) (West. Supp. 1979).

[16] E.g. Hills v. Gautreaux, 425 U.S. 284 (1976); Lau v. Nichols, 414 U.S. 563 (1974); Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

III. PLAINTIFF HAS MET THE MODEST BURDEN SECTION 504 IMPOSES ON PLAINTIFFS OF SHOWING THAT THE UNIVERSITY'S PROGRAMS RECEIVE FEDERAL FUNDS

The University failed to argue below that § 504 did not apply to its actions in this case, and indeed coverage is so apparent that the failure is hardly surprising. As this Court's cases show, plaintiff met the modest burden § 504 imposes on him in this regard by establishing that the University receives significant federal funding. Even were the Court to doubt that the stipulated facts are sufficient, the failure of the University to identify which specific "program" is involved, and the general lack of a factual record on the specifics of federal funding, would counsel at most remand for development of the record. If the case is to be remanded, this

Court should instruct the courts below, in accord with ordinary principles of common law, that the University bears the burden of coming forward with evidence that the relevant program is not federally funded.

A. A Handicapped Student Suing A University Need Prove Only That the University Is A Recipient of Federal Funds in Order to State a Claim Under Section 504.

The "activity" in which the University of Texas is engaged is post-secondary education at the undergraduate and graduate levels.

The University of Texas receives at least $31,400,000 per year in federal financial assistance. The pervasive impact of this largesse is obvious. Without it, education and research at the University would be curtailed by more

than 15%. The stipulated figure almost certainly understates the degree of the University's reliance upon federal funding. There are no facts in the record to indicate whether that amount reflects various forms of federal financial assistance to students in the form of loans and education benefits which at least one court has held, correctly, are sufficient, without more, to require a University's compliance with Title VI and Section 504. Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd mem. 529 F.2d 514 (4th Cir. 1975). See also Grove City College v. Harris, Civ. No. 78-1293 (W.D. Pa. March, 1980). A review of the regulations promulgated pursuant to Section 504, and of that Section's legislative history,and well-established doctrine under the closely analogous

provisions of Title VI and the Revenue Sharing Act demonstrate that Section 504 should not be read to require plaintiffs to trace federal funds directly to a particular course in which they are enrolled.

The regulations promulgated under Section 504 and interpretations of analogous legislation demonstrate that "program specificity" is not a requirement for maintaining an action under Section 504. The University of Texas has stipulated that it receives considerable federal assistance, and it has never denied that this assistance permeates and supports -- in at least some measure -- all of its programs and operations in higher education and research. In recognition of the impossibility of reliably determining which state college classes are or

are not supported by federal assistance when the college itself is a recipient of such assistance, this Court has previously found that a college is bound by Section 504 upon a mere showing by a plaintiff that the college is "a state institution that receives federal funds." Southeastern Community College v. Davis, 442 U.S. at 400. Plaintiff Camenisch has more than satisfied this requirement here. The practical approach followed in Southeastern Community College is reflected in the HEW regulations implementing Section 504, which are directed not to individual lectures or classes or administrators of programs, but to recipients of federal funds, 34 C.F.R. Part 104.[17]

The clear Congressional intention to model Section 504 upon Title VI makes this point even clearer, because "program

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17 See 34 CFR §104.44(d), quoted above at pp. 25-6.

specificity" is not a requirement in Title VI. The receipt of federal financial assistance in any form, including only direct loans or grants to students, triggers a requirement of compliance with all Title VI requirements and implementing regulations. Bob Jones University v. Johnson, 397 F. Supp. 596 (D.S.C. 1974), aff'd mem. 529 F.2d 514 (4th Cir. 1975). To hold otherwise in an analogous case to this under Title VI would be to say that the University of Texas could permissibly restrict some of its programs to white students only, if those programs received no direct federal assistance.

No court has ever required proof of program specificity in Section 504 or Title VI. The University's reliance on Trageser v. Libble Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979) and Carmi v. Metropolitan St. Louis Sewer Dist., 620

F.2d 762 (8th Cir.), cert. denied, _____ U.S. _____, 101 S.Ct. 249 (1980), is misplaced and misleading. The only issue decided in those cases is not present in this case -- whether employment discrimination is included within the scope of activities covered by Section 504.[18] Nor have private plaintiffs in Title VI actions been required to make such a showing.[19]

The broad interpretation given the

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[18] The Fourth Circuit held in Trageser that employment discrimination was covered by a separate statutory provision under Titles V and VI. The court summarily distinguished Trageser from Southeastern Community College v. Davis: "That was not an employment discrimination case." 590 F.2d at 90 n. 12.

[19] The Title VI case cited by the University in support of its proposition,

(footnote continued)

phrase "program or activity" in analogous statutes prohibiting discrimination confirms this result. In regulations implementing the antidiscrimination provision of the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §1242(a)(2)(A) (the "Revenue Sharing Act"),[20] for example, the Office of Revenue Sharing of the Department of the Treasury makes clear that, by virtue of that revenue sharing allocation, a Police Department as a whole is a "program or activity" subject to 31

(footnote continued)

Board of Public Institutions of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), was a challenge to an administrative action by HEW terminating federal funds to a school district for violation of Title VI.

[20] 31 U.S.C. § 1242(a) prohibits discrimination under any program or activity of a "unit of local government" that receives revenue sharing funds.

U.S.C. § 1242(a)(1). Consequently, no particular subcategory of the Department may escape that provision through the exception in 31 U.S.C. § 1242(a)(2)(A):

> "Program or activity" means the operations of the agency or organizational unit of the government receiving or substantially benefiting from [revenue sharing] funds, e.g., a police department; department of corrections; health department.

31 C.F.R. § 51.51(i) (1979), reprinted in 2 Empl. Prac. Guide (CCH) ¶ 4855.51.[21]

These regulations and the broad interpretation courts have given the

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[21] Prior to April 2, 1979, 31 C.F.R. § 57.51(7) read in relevant part as follows:

> "Program or activity" means any function conducted by an agency or department of the recipient government which government has received or is receiving [revenue sharing funds] ....

44 Fed. Reg. 19191 (April 2, 1979).

concept of program or activity in the context of these antidiscrimination provisions[22] should guide this court in rejecting the University's implausibly narrow reading of Section 504.

Under the University's theory, a cynical or recalcitrant recipient could funnel its federal funds to fairly administered projects and could use the non-federal funds made available by that federal allocation to engage in blatant discrimination elsewhere, without violating the Rehabilitation Act. Petitioners' restrictive reading of "program or activity" would subvert the Congressional decision

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22 See e.g. United States v. Baltimore County, 19 FEP ¶ 403 (D. Md. Dec. 1, 1978).

to overcome discrimination based on handicap, and would indeed only encourage it by creating an incentive for making accounting and bookkeeping decisions based strictly upon issues relating to handicap. Congress plainly contemplated no such result.

B. The Stipulated Facts Concerning Federal Funding Suffice for Granting Camenisch the Relief Requested, And This Court Should Not Hold Otherwise Without First Remanding the Case for Development of a Factual Record

The issue of whether Section 504 applies only to the specific programs that receive federal aid was never raised, never pleaded as a defense, and never briefed or argued below. For the first time in the lengthy course of proceedings in which it has been engaged with the plaintiff Camenisch, the University of Texas has now asked this

Court to decide whether a plaintiff in litigation under Section 504 is required to prove that federal assistance was directly received by the particular program or activity against which he claimed discrimination or exclusion. Amici strongly believe that Section 504 embodies no such requirement. See Point IIIA, supra. However, if the Court should doubt that this is so, it still ought not to decide that there is a "program or activity" requirement on the basis of the record presented here. To do so would be both premature and ill-advised. Not only have there have been no findings of fact below on this issue; there have not even been moderately specific factual presentations or arguments by either party. Consequently, if the Court wishes to consider a possible

"program specificity" requirement under Section 504, it should do so only after remanding this case for further factual findings.

The essence of the University's newly-raised position is that, despite the clear mandate of the applicable regulations and a specific contrary finding by the federal agency charged with the duty of enforcing and interpreting Section 504, it was not required to provide the sign interpreter or other alternative ordered by the District Court because Camenisch did not prove he sought participation in a "program or activity" within the meaning of Section 504. But the University never objected on this basis in the district court or suggested that it might be grounds for a remand

in the Court of Appeals.

Moreover, even in its argument before this Court, the University has not alleged that there was no federal funding in Camenisch's program. In these circumstances, its rights under § 504 in this regard are not even arguably jeopardized. Compare Codd v. Velger, 429 U.S. 624, 627-28 (1977). Nor, in any event, has the University even attempted to define which of its "programs or activities" it thinks is involved -- or, rather, exempted. In short, the University has made no showing that the issue is relevant to the disposition of the case: it is purely hypothetical.

In addition, it is relevant here that the University signed an Assurance of Compliance Form with HEW agreeing to comply with the HEW Section 504 regulations in

all its programs.[23] Had the University believed the regulations went beyond the statute, it had administrative and judicial remedies to resolve that dispute. Having foregone these remedies, accepted the federal funds, and permitted handicapped persons like Camenisch to register for its courses in reliance on the broad protection of the Assurance of Compliance as signed, the University may not now be heard to escape from its contractual obligation as to such students,

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23 The language of the Assurance is unambiguous. The University agreed to assure that "it will comply with Section 504 of the Rehabilitation Act and all requirements imposed by the applicable HEW regulations (45 C.F.R. Part 84)." The Assurance was given for valuable consideration, namely "any and all federal grants, loans, contracts . . . property, discounts or other federal financial assistance extended by the Department of Health Education and Welfare."

even if it could do so prospectively. See United States v. Caceres, 440 U.S. 741, 753 n. 15.

C. If Evidence Concerning A Particular "Program or Activity" Were Required Under Section 504, Ordinary Principles of Common Law Would Place The Burden of Coming Forward With Such Evidence Upon Defendants, Not Plaintiffs.

Even if the Court were to decide that a highly particularized finding must be made in Section 504 litigation whether the precise "program or activity" concerned directly benefitted from federal aid, the burden of supplying the evidentiary basis for such a finding must be with Section 504 defendants, not plaintiffs.

In civil contexts, courts retain the

power and responsibility to define and allocate the production and persuasion burdens. E.g. Castaneda v. Partida, 430 U.S. 482 (1977); Keyes v. School District No. 1, 413 U.S. 189 (1973); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967). See generally, Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). Modern analysis has suggested that allocation of the burdens of proof is governed by three factors: (1) the degree of difficulty anticipated in proving the fact at issue; (2) the relative ease of access to the evidence; and (3) the direction of error displacement which the legal system wishes to affix to a given fact finding process. See e.g., Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal

Cases, 86 Yale L.J. 1299 (1977); McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242 (1944). Whether one approaches the burden of proof issue in this case from the perspective of difficulty of proof, relative ease of access to the evidence, or displacement of error, the burdens of proof should be borne by the defendants, after plaintiff meets an initial burden of coming forward to demonstrate that the institution receives federal assistance.

Federal financial assistance to colleges and universities like the University of Texas is pervasive, including research grants, construction funds and direct aid to the students themselves in the form of benefits (e.g. Veterans benefits) and loans. The University is the only party with routine access to the records of how

such federal assistance is received and how it is disbursed. Given the extensive involvement of federal funds in post-secondary education it is not unrealistic to presume that any particular program has received some federal financial assistance, at least in the form of government grants or loans to students enrolled.

Moreover, to the extent that error is to be displaced it should be displaced in the direction of ending discrimination against qualified handicapped individuals. Traditionally, our legal system has effected such a displacement of error by a sensitive allocation of the persuasion burden to favor deeply felt social goals.

Conclusion

For the foregoing reasons, the Court should hold that Section 504 of the

Rehabilitation Act of 1973 confers a private right of action, that the University of Texas has discriminated against respondent in the circumstances of this case, and that there is no requirement of program specificity under Section 504, or that that issue is not properly before the Court in this case.

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No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF TEXAS, ET AL.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AMERICAN COALITION OF CITIZENS WITH DISABILITIES; ASSOCIATION ON HANDICAPPED STUDENT SERVICE PROGRAMS IN POST-SECONDARY EDUCATION; EPILEPSY FOUNDATION OF AMERICA; NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS; NATIONAL EDUCATION ASSOCIATION; PENNSYLVANIA SOCIETY FOR THE ADVANCEMENT OF THE DEAF; TEXAS PROTECTION AND ADVOCACY SYSTEM: ADVOCACY, INC.; UNITED CEREBRAL PALSY ASSOCIATION AND BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Coalition of Citizens with Disabilities, the Association on Handicapped Student Service Programs in Post-Secondary Education, the Epilepsy Foundation of America, the National Association of Protection and Advocacy Systems, the National Education Association, the Pennsylvania Society for the Advancement of the Deaf, the Texas Protection and Advocacy System, and the United Cerebral Palsy Association respectfully move this Court for permission to file the attached Brief Amici Curiae. The proposed *amici* are "consumer," legal advocacy and educational organizations who represent and support the interests of handicapped persons. These organizations and their memberships are vitally interested in the outcome of this case as it regards the accessibility of post-secondary education to handicapped persons.

The American Coalition of Citizens with Disabilities, Inc. (ACCD) is a not-for-profit organization whose

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members include organizations of disabled individuals. ACCD's national members include the American Council of the Blind, Epilepsy Foundation of America, National Association for Retarded Citizens, National Association of the Deaf, National Association of the Physically Handicapped, National Paraplegia Foundation, Paralyzed Veterans of America, and United Cerebral Palsy Associations. ACCD seeks to speak with a unified voice advocating on behalf of the nation's entire disabled population. ACCD has taken an active role in attempting to remedy past practices of discrimination against physically and mentally handicapped citizens.

The Association on Handicapped Student Service Programs in Post-Secondary Education (AHSSPPE), with a membership of approximately 500 persons, was established in 1978 to provide a vehicle to strengthen the professionalism, the expertise, and competency of persons working with handicapped students on college campuses. In addition, the Association is committed to promoting equal rights and opportunities for handicapped post-secondary students and graduates.

Epilepsy Foundation of America (EFA) is a non-profit organization established to promote research, support educational and vocational programs, and provide educational information in regard to epilepsy and the problems faced by persons having epilepsy. EFA's national office in Washington, D.C. is responsible for national programs which include advocacy and patient services. EFA has worked diligently to ensure that persons with epilepsy are not denied the opportunity to participate fully in educational programs at all levels.

The National Association of Protection and Advocacy Systems (NAPAS) is an organization consisting of the executive directors of the state protection and advocacy systems. Under Section 113 of the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6012, each state is required to have in effect a system to protect and advocate the rights of developmentally dis-

abled individuals. As the national organization of the protection and advocacy systems, NAPAS is dedicated to furthering the human and legal rights of disabled persons.

The National Education Association (NEA), the nation's largest professional organization with a membership of 1.7 million persons, is an independent, voluntary entity whose purpose is to advance the interests of the profession of teaching and to promote the cause of education. To this end NEA has long advocated free, appropriate education for all handicapped individuals, including the provision of support services to meet the learning needs of disabled students.

The Pennsylvania Society for the Advancement of the Deaf (PASD) is a consumer organization dedicated to securing and advancing the needs of deaf persons in the state of Pennsylvania. As such, PASD actively supports the provision of necessary auxiliary aids to deaf individuals in higher education.

Advocacy, Inc. is the Texas protection and advocacy system. Its purpose is to ensure that disabled persons are not denied their legal and human rights, in particular, the right to education. Advocacy, Inc. has a special interest in the outcome of this case, as it concerns the accessibility of higher education to disabled individuals served by the agency.

United Cerebral Palsy Association (UCP) is a nationwide network of community agencies serving the lifetime needs of children and adults with cerebral palsy. UCP has long sought equal access to education for handicapped individuals.

The present case raises questions about the rights of qualified handicapped students to participate fully in federally assisted higher education programs. To these questions, the proposed *amici* bring a unique perspective, beyond the more confined presentations of the specific parties to the case. As educators, disabled individuals, and legal advocates, the proposed *amici* seek to ensure that no

qualified handicapped student is denied the opportunity to gain the benefits of a higher education.

As handicapped individuals, the proposed *amici* would discuss the need for auxiliary aids for certain qualified disabled students in order that illegal discrimination on the basis of handicap may be eliminated by institutions of higher education. As legal advocates, the proposed *amici* would present a detailed analysis of the numerous federal programs that can be used by colleges and universities to assist in the provision of auxiliary aids to handicapped students. And, as educators, the proposed *amici* would offer factual descriptions of numerous programs throughout the nation whereby auxiliary aids are provided to qualified handicapped college students without charge to the student or unfair burden to the post-secondary educational institution.

Wherefore, the proposed *amici* respectfully pray this Court for permission to file the attached Brief Amici Curiae.

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January 28, 1981

No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF TEXAS, ET AL.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set out in the attached Motion for Leave to File Brief Amici Curiae, pp. v-viii, *supra.*

SUMMARY OF ARGUMENT

Section 504 was intended by Congress to bring handicapped persons into the mainstream of society. It is a promise of integration and of opportunity to participate in and benefit from federally assisted programs, so that handicapped persons might lead more meaningful lives and no longer have to struggle for the dignity of treatment non-handicapped persons take for granted.

In order to ensure that this promise is not empty and unfulfilled, Section 504 must be construed to require, not simply a *pro forma,* identity of treatment of qualified handicapped persons, but also, in appropriate contexts to require effective accommodations which allow qualified disabled persons equal opportunity to participate in and benefit from federally assisted programs. Otherwise, the great majority of handicapped persons will remain in the same tragic state of segregation as they were before the passage of Section 504.

The Department of Health, Education and Welfare has properly included an auxiliary aid requirement in its Section 504 regulations stipulating that interpreter services be provided by post-secondary institutions for qualified deaf students where necessary for their effective participation in academic programs.

The experiences of many colleges and universities throughout the country in providing these services makes manifest that such accommodations can be furnished with remarkable success. Moreover, due to efficacious utilization of a wide array of federal and state funding schemes, the programs operated by these institutions demonstrate conclusively that interpreter services can be provided without cost to the student and with minimal obtrusion into the recipient's operation.

Finally, although the interpreter requirement imposes certain obligations upon recipients, Congress has allocated substantial amounts of federal money through numerous spending programs in order to help recipients meet the costs of complying with this regulation.

I.

SECTION 504 REQUIRES THAT RECIPIENTS PROVIDE EFFECTIVE ACCOMMODATIONS IN ORDER THAT QUALIFIED HANDICAPPED PERSONS MAY HAVE THE SAME OPPORTUNITY TO BENEFIT FROM A RECIPIENT'S PROGRAM AS NON-HANDICAPPED PERSONS. ALTHOUGH SECTION 504 REQUIRES REASONABLE MODIFICATIONS, IT DOES NOT MANDATE THAT RECIPIENTS UNDERTAKE TRADITIONAL AFFIRMATIVE ACTION STEPS.

The most appropriate point of departure in this case is the language of Section 504. In relevant part, it provides:

> No otherwise qualified handicapped individual in the United States, as defined in § 706 (6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. § 794 (1976).

Keeping in mind this statutory language, the types of recipient action which will comport with Section 504 are readily understood. Section 504 is not necessarily complied with when a recipient merely allows a handicapped person to enroll in its program or activity in a nominal fashion. The equality of treatment which Section 504 requires is not a *pro forma*, identity of treatment, but rather is best defined by measuring the extent of the actual opportunity afforded the handicapped person to participate in a given program.

In the instant case, the University of Texas argues that it has fulfilled its Section 504 obligation by merely allowing the respondent, Walter Camenisch, into its classroom. This action by the University, however, does not go to the substance of what Section 504 was intended to provide — equal opportunity for handicapped persons to participate in federally assisted programs.[1] By merely

[1] That this is the purpose and intent underpinning Section 504 is manifested throughout its legislative history. E.g. 118 Cong. Rec. S. 525 (1972) (remarks of Sen. Humphrey); 117 Cong. Rec. H 45974 (1971) (remarks of Rep. Vanik); S. Rep. 93-1297, pp. 38, 39-40; *reprinted in* [1974] U.S. Code Cong. and Administrative News 6389, 6390-91.

allowing the respondent into its program, the University of Texas did not provide the respondent with a functionally meaningful treatment. This treatment was no more functionally meaningful than if the University of Texas said to a person confined to a wheel chair that, yes, they could enroll in a certain class located in a building that could only be entered by climbing a set of steps but that, no, it would not provide them with a ramp to get them into the building. By allowing Mr. Camenisch into its program but still requiring him to pay for his own interpreter, the University in effect imposes a surcharge upon him for his handicap; whereas all non-handicapped students have an opportunity to participate in and derive benefits from the program without imposition of this surcharge.

Perhaps the clearest judicial exposition of the principle that equal treatment may require more than passive, *pro forma,* identity of treatment to breathe true meaning and substance into the equality required, can be found in *Lau v. Nichols,* 414 U.S. 563 (1974), a case with particular relevance to the instant one. *Lau* involved a class-action suit brought by non-English speaking Chinese-American students who alleged that they had been effectively excluded from participation in an educational program because they received no supplemental instruction in the English language. The students claimed this was a violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1975).

Justice Douglas, in construing Section 601 for the majority held that:

> There is not equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. . . . It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program.

Id. at 566.

It is crucial to note here that the legislative history of Section 504 makes it clear that it was sedulously patterned after the language of § 601 of the Civil Rights Act of 1964 and was intended to provide the same degree of anti-discrimination protection. S. Rep. No. 93-1297, 93rd Cong. 2nd Sess. 39, *reprinted in* [1974] U.S. Code Cong. and Admin. News 6373, 6390.[2]

Similarly, federal courts which have considered the issue have found that, in certain instances, Section 504 requires a duty on the part of recipients to accommodate handicapped persons.

In *Tatro v. Texas,* 625 F.2d 557 (5th Cir. 1980), the 5th Circuit Court of Appeals, in ruling that the failure of a school district to provide clean instrument catherization (CIC) was a violation of § 504, stated:

> . . . [the plaintiff] has been excluded from the school district's programs by the district's refusal to provide CIC. Without the provision of CIC to [the plaintiff], she will be unable to participate in the preschool programs of the school district. Such exclusion is expressly condemned by Section 504.

Id. at 564.

In *Gary B. v. Cronin,* No. 79-C5383 (N.D. Ill. June 10, 1980), a class of emotionally disturbed children sought declaratory and injunctive relief with respect to an Illinois regulation which excluded counseling and thereapeutic services from being considered special education or related services. The plaintiff class alleged that such a regulation was a violation of, *inter alia,* Section 504. The court, in

[2] The report states at p. 6390: "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of Section 601 of the Civil Rights Act of 1964, and Section 901 of the Education Amendments of 1972. The section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap . . ."

analyzing Section 504 and its implementing HEW regulations stated:

> Reading *Davis v. Southeastern Community College,* 442 U.S. 397 (1979)], with *Lau* and *Campbell* [*Kruse v. Campbell,* 434 U.S. 808 (1977) (Mem.)], this court concluded that a balancing test is appropriate with respect to HEW's regulations under Section 504. HEW, of course, has the task of identifying those cases where failure to act constitutes discrimination and may promulgate regulations imposing affirmative duties on recipients of Federal funds, provided these duties do not become so burdensome as to significantly lower the recipient's standards.

Id.

The Department of Health, Education, and Welfare regulations have incorporated the concept that the equality intended to be extended to handicapped persons by Section 504 may of necessity require accommodations on the part of a recipient. As the Analysis to the Regulations states:

> . . . the term 'equally effective' . . . is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet individual needs to the same extent that the corresponding needs of non-handicapped persons are met, adjustments to regular programs may sometimes be necessary . . . This standard parallels the one established under Title VI of the Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols,* 414 U.S. 563 (1974).

45 C.F.R. Part 84, Appendix A, p. 380 (1979).

The specific H.E.W. regulation operative in this case states that recipients:

> . . . shall take such steps as are necessary to ensure that no handicapped students is denied the benefits of

> [or] excluded from participation in . . . the education program . . . because of the absence of auxiliary aids.

45 C.F.R. Sec. 84.44 (d) (1). The regulation goes on to include interpreters as such auxiliary aids in Section 84.44 (d) (2) (1979).

This regulation is a carefully crafted practical application of the intent and purpose underpinning Section 504 — the integration of handicapped persons into federally assisted programs. It does not attempt to make the recipient responsible for the overall integration of the handicapped student into campus life. In fact the regulation specifically precludes provision of aids for personal use or study. 45 C.F.R. Section 84.44 (d) (2) (1979).

Moreover HEW took into account the valid concerns expressed by some colleges and universities about the costs involved in complying with the auxiliary aid requirements. HEW emphasized that in large part such costs could be met by utilizing existing resources 45 C.F.R. Part 84 Appendix A, p. 392 (1979).

This Court, in *Southeastern Community College v. Davis,* 442 U. S. 397 (1979), held that if HEW had attempted to impose an affirmative action obligation upon recipients it lacked authority to do so. 442 U.S. at 412. Although this would preclude HEW from requiring that recipients implement traditional affirmative action steps such as quotas or seniority relief often used to remedy past discrimination against for example, racial minorities, the Court's language makes it clear that recipients under Section 504 still have a duty where appropriate to make accommodations in their programs. For instance, this Court stated in *Davis* that:

> Such [technological] advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus situations might arise when a refusal to modify an existing program might become unreasonable and discriminatory.

Id. at 412-413.

Affirmative action as this Court spoke of it in *Davis*, cannot be taken to mean the imposition of any financial obligations on a recipient in order to accommodate handicapped persons. The use of the phrase "undue financial . . . burden" reflects this Court's understanding that Section 504 may require a recipient to spend a reasonable amount of funds in order to accommodate handicapped persons.

Thus, while Section 504 does not require traditional affirmative action steps by recipients in order to actively increase handicapped persons' position and number in federally assisted programs, it does require recipients to make reasonable modifications in their programs so that handicapped persons at least have an equal opportunity to participate in and derive benefits from them.

II.

NUMEROUS COLLEGES AND UNIVERSITIES PROVIDE HANDICAPPED STUDENTS IN GENERAL, AND DEAF STUDENTS IN PARTICULAR, WITH AUXILIARY AIDS AND OTHER EFFECTIVE ACCOMMODATIONS WHICH AFFORD THEM EQUAL OPPORTUNITY TO PARTICIPATE IN AND DERIVE BENEFIT FROM ACADEMIC PROGRAMS. MOREOVER, THESE COLLEGES AND UNIVERSITIES UTILIZE A WIDE VARIETY OF FEDERAL AND STATE FUNDING PROGRAMS TO ASSIST THEM IN MEETING THE COSTS OF PROVIDING SUCH AIDS.

Until the early 1970's, few alternatives were available to physically handicapped students who wished to continue their education beyond the high school level. Students who were hearing-impaired, for example, were usually limited to attending either Galludet College in Washington, D.C. or the National Technical Institute for the Deaf in Rochester, New York.[3] In the rare situation

[3] Galludet College is a liberal arts college for deaf and hearing-impaired students.

The National Technical Institute for the Deaf was established by federal law in 1969. 20 U.S.C. §§ 681-684 (1975). Its basic purpose is to provide technical and vocational training to deaf and hearing impaired post-secondary education students.

Both Galludet College and the National Institute for the Deaf are supported in large part by federal funds.

where a hearing-impaired individual was permitted to enroll at a local college or university, instruction was generally provided solely on an oral basis, thus denying the student the opportunity to effectively participate in or gain benefit from the educational experience. See, generally, Holm, "The University of Minnesota: New Programs for Deaf Students", *The Deaf American,* 13-17 (October 1980). Given these obstacles, the success rates of students attending these institutions was often understandably low.

With the enactment of Section 504, however, numerous colleges and universities began to develop programs to assist in the full integration of qualified handicapped students into the mainstream of campus life. By the Spring of 1978, a survey conducted by Galludet College revealed that at least sixty such programs had been established to provide assistance to hearing-impaired and deaf students. Galludet College, "A Guide to College/ Career Programs for Deaf Students" (1978). Today, while handicapped students continue to be underrepresented at the college level,[4] opportunities for higher education available to these students have greatly improved.

In this section, *amici* present detailed descriptions of several handicapped student support programs presently in existence. The continued operation of these programs demonstrates conclusively that auxiliary aids, as required by 45 C.F.R. § 84.44 (d), can be provided to deaf students in the same situation as the respondent without the imposition of undue financial or administrative burdens upon the institution.

The information presented herein was obtained, in part, through an informal survey of several colleges and

[4] A major survey of college freshmen conducted in September of 1978 revealed that approximately 2.6 percent of all beginning college freshman were physically disabled. The expected prevalence rate for handicapped persons between the ages of 16 and 25 is estimated to be 8.1 percent according to the U. S. Education Department. Of those students who reported that they were handicapped, 10.3 percent cited hearing impairments. President's Committee on Employment of the Handicapped, "The Disabled College Freshman," 1-2 (undated).

universities. Policy statements from a number of these institutions regarding the provision of auxiliary aids to deaf and hearing-impaired students have been included in Appendices A and B. Appendix C includes a letter from the Arkansas Rehabilitation Services Administration detailing that State's policy of providing interpreter services in higher education.

A. Scope of Individual Handicapped Student Services Programs.

Today, many colleges and universities are successfully educating handicapped students with a broad range of physical disabilities. In addition to those students who are deaf or hearing-impaired, many institutions provide services to blind and visually handicapped students, persons with epilepsy and cerebral palsy, and individuals with mobility difficulties. Because of the diversity of this population, it is often difficult to generalize about the specific services and aids that are necessary for the full integration of handicapped students.

Despite this diversity, certain auxiliary aids and services appear to be routinely provided to handicapped students at many colleges and universities. For example, Southern Illinois University provides such services as accessible campus transportation, readers, braille writers, tape recorders and tutoring services. Marquette and Memphis State Universities and the University of North Dakota, as well, provide similar assistance. Additional services noted by several colleges included individualized arrangements for the administration of tests, referral services of accessible housing and attendant services, and availability of taped and large print books.

Of particular significance to the present case are those auxiliary services provided to students who are deaf or otherwise hearing impaired. Depending upon the severity of the impairment as well as the student's level of communication, a wide variety of services are provided to

these students.[5] Accommodations for individuals with hearing disabilities may be as unobtrusive as simply allowing a student with sufficient lipreading skills to sit in the location that best enables him or her to watch the instructor speak. See Appendix A, p. 5a, *infra*. In other instances, deaf students may require the services of manual or oral interpreters. The Disabled Student Services Office at Boston University specifically describes this need for individual consideration:

> Due to the variety of types and severities of hearing impairments, and consequent specific needs, we consult each individual separately who approaches us for some type of service. When we find that a hearing-impaired student validly needs a sign-interpreter for a class, we inform the student of what we believe to be our ethical as well as legislative responsibility for funding the interpreter.

Appendix A, p. 3a, *infra*.

Numerous colleges and universities have similarly described their policies of providing interpreter services at no cost to the individual. As stated by Dr. Joan Austin, Director of the Office for the Disabled at Temple University:

> When you consider the fact that we subsidize athletes, chemistry students, physicians and veterinarians, just to name a few, and that their tuition fees by no means cover the cost of their education it is somewhat embarrassing to think that the issue of "undue hardship" has even been raised when it comes to access to the classroom for deaf students. It is clear

[5] A recent publication describes several types of accommodations that are commonly provided to deaf and hearing-impaired students of higher education including telecommunication devices for deaf persons (TDD's), amplifying phone receivers, hearing aids, and manual and oral interpreters. This guide is intended to provide assistance to college professors in teaching deaf and other handicapped students. President's Committee on Employment of the Handicapped, "The College Student With a Disability: A Faculty Handbook," 7-9 (undated).

> that if a student who has paid his tuition in order to attend classes cannot hear what the professor is saying, there is, in fact, no access to that class. . . . . [I]t seems to me to be very clear that an interpreter is, in fact, the voice of the professor. Students are paying tuition in order to receive instruction . . . . It should not cost a deaf student additional tuition for the same opportunity.

Appendix A, p. 13a, *infra*. See, also, Appendix B, *infra*.

B. Funding for Auxiliary Aids and Services to Handicapped Post-Secondary Students

A broad range of financial assistance programs are generally available to colleges and universities for the purpose of helping these institutions meet their Section 504 obligations. In Section III, *infra, amici* discuss in detail the numerous federal spending programs that can be used for this purpose. On several occasions, state legislatures have provided funds to post-secondary institutions that are earmarked specifically for providing services to disabled students. In Arkansas, for example, the legislature appropriated $48,100 during the fiscal year ending June 30, 1980, for the purpose of providing interpreter services and telecommunications equipment for the use of deaf students in state-supported colleges and universities. Additional funds were appropriated for fiscal year 1981. Appendix C, p. 22a, *infra*.

State vocational rehabilitation agencies are usually the first resource considered when an institution seeks funding to support auxiliary services for handicapped individuals. See Section III B, *infra*. The Director of Services to the Handicapped at Fordham University states, for example, that "our experience has been that most of our hearing impaired or deaf students . . . have funding for such services [interpreters] through the Office of Vocational Rehabilitation and that they pick their own interpreters . . . ." Appendix A, p. 5a, *infra*. This experience has apparently been shared by numerous other colleges and universities in the Pennsylvania and New York areas. An

informal survey of several of those institutions indicated that all would utilize or have utilized funding through state agencies providing vocational rehabilitation services. See, Appendix B (listing colleges and universities contacted and their responses). Several colleges reported that vocational rehabilitation funding has absorbed the total cost of interpreter services.

When federal or state funds are not available, colleges and universities have used their funds creatively to provide interpreter services at minimal cost. For example, the New York State Department of Education provides funding for interpreter services at eight colleges and universities in the New York metropolitan area. In Philadelphia, the University of Pennsylvania utilizes funds from a private foundation to finance interpreter services. Pennsylvania's Edinboro State College has drawn on students trained in sign language to provide communication accessibility to other students. Similarly, Albright College in Reading, Pennsylvania states that should interpreter services be required at the college, it would likely use its own student body to provide such services. Appendix A, p. 2a, *infra*. See, also, discussion of federally funded college work-study program, Section III A 1, *infra*.

While this investigation is by no means comprehensive, it demonstrates that with common sense and innovative thinking, auxiliary aids and accommodations for deaf and other physically handicapped students can be provided by post-secondary institutions in ways that are neither onerous nor offensive.

III.

RECOGNIZING THAT ELIMINATING DISCRIMINATION AGAINST QUALIFIED HANDICAPPED INDIVIDUALS BY RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE MAY IMPOSE CERTAIN BURDENS UPON RECIPIENTS, CONGRESS HAS ENACTED NUMEROUS STATUTES, ESTABLISHED A WIDE VARIETY OF FEDERAL PROGRAMS, AND EARMARKED SUBSTANTIAL AMOUNTS OF FEDERAL DOLLARS TO AID RECIPIENTS IN MEETING THE OBLIGATIONS IMPOSED UPON THEM BY SECTION 504.

The purpose of this section is to describe and discuss the various federal programs that have been designed to aid disabled persons in obtaining the benefits of higher education. The relevance of these programs to the present case is three-fold. Not only does their existence and expansion in recent years represent a continuing commitment on behalf of Congress to achieve the goals set out in Section 504, but these programs are also a large source of financial, administrative, and technical aid to the post-secondary institutions who are required to make their programs accessible to handicapped students. In many of the college and university programs for deaf students described in Section II, *supra,* federal aid is the primary source of funds for continued operation. As such, it is likely that the petitioner could have sought similar federal assistance to provide the respondent the necessary interpreter in the present case.

The availability of these federal funds does much to dispel the University of Texas' argument that the financial cost of providing Mr. Camenisch an interpreter places an unreasonable burden on the University's fiscal operation. (See Brief for Petitioner at p. 10.) As these funding sources appear to have been available to the Petitioner, and, as demonstrated in the preceeding Section, many colleges and universities have utilized these sources to provide auxiliary aids to their handicapped students, the Petitioner does not effectively show that it must bear an unfair burden in this situation.

Finally, insofar as the regulation requiring the University of Texas to provide the respondent a classroom

interpreter, 45 C.F.R. Section 84.44(d) (1979), is challenged in this case, the existence of the federal programs described herein provides support for the decision of HEW to issue Section 84.44(d). As this Court recognized in *Southeastern Community College v. Davis*, the "[i]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." 442 U.S. 397, 413 (1978). It is clear from both the language of Section 84.44 as well as the preamble and appendix to the regulations that HEW carefully weighed the burden to be placed on colleges and universities by Section 504 against the benefits to be obtained from the full integration of qualified handicapped students into post-secondary education programs. The massive federal assistance already being provided to institutions of higher education to support services for handicapped students was clearly one factor used by HEW in measuring the extent of this burden. See 45 C.F.R. Part 84 Appendix A p. 392 (1979).

A. Federal Assistance to Students and Institutions of Higher Education

In 1974, Congress offered the following statement of national policy:

> Recognizing that the Nation's economic, political, and social security requires a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

20 U.S.C. § 1221-1 (1978). That this opportunity is to be provided to all persons, especially handicapped individuals, is evidenced by Congress' statement that special emphasis be given to "the adequacy of education at all levels in meeting the special educational needs of such individuals as handicapped persons, . . ." 20 U.S.C. § 1221-1 note (1978). The removal of the financial barriers

to equal educational opportunity has long been among the highest of Congressional concerns. In addition to massive spending programs designed to assist the states in educating pre-school, elementary, and secondary students,[8] numerous federal assistance programs have been established on the post-secondary education level. Many of these programs are related specifically to the education of handicapped persons. Generally, this assistance falls into two categories: direct aid to students and aid to the institutions of higher education.

1. *Federal aid to post-secondary education students*

A major source of financial aid to students of higher education is the college work-study program. Originally established under Sections 441-447 of the Higher Education Act of 1965, as amended, Pub. L. No. 89-329, 79 Stat. 1219, this program is designed to "stimulate and promote the part-time employment of students, particularly students with great financial need, in eligible institutions who are in need of the earnings of such employment to pursue courses of study at such institutions." 42 U.S.C. § 2751(a) (1973). See, generally, *Brown v. Bates,* 363 F. Supp. 897 (N.D. Ohio 1973). The United States Department of Education recently identified this program as a potential resource for post-secondary education institutions that desire assistance in providing auxiliary aids to handicapped students. Specifically, the Department states:

> [s]tudents employed through the College Work-Study Program can provide reader and note-taker services for visually-impaired students and students with manual handicaps. These students, if trained, can provide interpreter services for deaf students, and attendant services for mobility-impaired students.

U.S.E.D. "Auxiliary Aids: A Resource Guide for Postsecondary Schools, Rehabilitation Agencies and Handicapped

[8] See, for example, The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 20 U.S.C. §§ 1401 *et seq.* and The Headstart Program, 42 U.S.C. § 2928 (1973).

Individuals" (Draft, Nov. 20, 1980) (hereafter "Auxiliary Aids"). See also 45 C.F.R. § 175.23 (1979) (Eligible Jobs for College Work-Study Students.) The appropriation for college work-study programs in FY 1979 was $547,023,000 which was distributed to 3,220 postsecondary educational institutions. The figures from FY 1980 are $550,000,000 to 3,300 postsecondary institutions. In 1974, Petitioners received $537,515; in 1975, $550,497; in 1976, $1,112,820; in 1977, $1,239,896; in 1978, $1,285,552; in 1979, $1,620,000 and in 1980, $2,300,000.

Section 417 of the Higher Education Act of 1965 as amended, establishes special federal programs for students from "disadvantaged backgrounds." 20 U.S.C. § 1070d-1 (1978). One of the purposes of the section is to provide supportive and other services to enable physically handicapped students to remain enrolled in and graduate from post-secondary institutions. 20 U.S.C. § 1070d-1(b) (1978). The regulations administering this program define the term "Physically Handicapped Student" as:

> those students who, because of their physical disabilities, need special designed instructional materials or programs, modified physical facilities or related services to participate fully in the experience and opportunities offered by postsecondary institutions.

45 C.F.R. § 157.2(k) (1979). Deafness is particularly mentioned within the list of physical disabilities, thus making this program especially relevant to the case at hand. *Id.*

During 1978-79, Congress appropriated $55.5 million to be given to eligible recipients in the form of grants and contracts under this program. Over 550 such awards were made during this period by the Office of Education. "Auxiliary Aids," *supra.*

In the most recent amendments to this section, Congress makes clear its intent that handicapped people do not need to also be economically disadvantaged in order to obtain the benefits available under this program. In Section 417(d), the Secretary of Education is directed when reviewing applications for projects under this subpart to "require an assurance that not less than ⅔'s of the persons

participating in a proposed project . . . (A) be physically handicapped, *or* (B) be low income individuals who are first generation college students." 20 U.S.C. § 1070d-1 (Supp. 1981) (Emphasis added).

The Basic Educational Opportunity Grant program (BEOG) and the Supplemental Educational Opportunity Grant program (SEOG) represent further sources of federal assistance to students enrolled in institutions of higher education. 20 U.S.C. § 1070a, § 1070b (1978). The grants-in-aid provided to college and university students under these combined programs range from awards of $200 to $1800 per academic year and may be used to absorb a wide variety of the actual costs of attending a post-secondary institution.

Federally funded graduate fellowships are also a large part of the Congressional effort to provide assistance to students enrolled at institutions of higher education. Under section 921 of the Higher Education Act of 1965, entitled "Fellowships for graduate and professional study," Congress authorized such sums as are necessary to provide financial assistance to students doing graduate level work in "fields of importance to the national interest." 20 U.S.C. §§ 1134d-1134h (1978). In awarding these fellowships, Congress directed that priority be given to preparing a "larger number of individuals from minority groups, especially from among such groups who have traditionally been underrepresented in colleges and universities." 20 U.S.C. § 1134d(F) (3) (1978).

Under a second program of graduate fellowships, Congress has directed that priority be given to individuals from disadvantaged backgrounds undertaking graduate or professional study. 20 U.S.C. § 1134n (1978).[7]

The majority of the programs described in this section are administered through individually-located campus financial aid offices. In 1977-1978, these offices provided an estimated 2.8 million post-secondary education stu-

[7] That physically handicapped persons are considered by Congress to be "from disadvantaged backgrounds" is established in 20 U.S.C. 1070d-1 (Supp. 1981).

dents more than 4.2 billion dollars of federal financial assistance. Office of the Inspector General, Department of Health Education and Welfare, "Guide for Audits of National Direct Student Loan Program, College Work-Study Program and Supplemental Educational Opportunity Grants Program," (July 1978). Over 8,000 colleges and universities participated in this activity. *Id.*

2. *Federal aid to institutions of higher education*

In addition to the large sums of federal dollars given in assistance to post-secondary education students, Congress has also earmarked vast amounts of federal funds for use by colleges and universities that can often be used to assist these institutions in providing for the full integration of handicapped students. A federal grants and contracts program is established under Section 404 of the Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783, for the purpose of improving post-secondary educational opportunities by providing assistance to institutions of higher education for "encouraging the reform, innovation, and improvement of post-secondary education, and providing equal educational opportunity for all." 20 U.S.C. § 1221d(a) (1) (1978). In 1974 and each year thereafter, Congress has set aside $75,000,000 for the purpose of implementing this goal. This program has supported many model projects for improving access to and the quality of post-secondary education for handicapped persons. "Auxiliary Aids" at 10.

Understandably, the process of applying for and receiving the grants and contracts described in the subsection can require a certain level of expertise among college and university administrators. Congress has not been insensitive to the bureaucratic problems usually associated with massive federal spending programs. Specifically, Congress has directed the federal Department of Education (and its predecessor, the Office of Education) to provide technical assistance to institutions of higher education which are seeking to obtain federal financial assistance, 20 U.S.C.

§ 1231c (1978). The scope of this assistance is broad — in particular, it includes assistance:

> (1) in determining benefits available to [post-secondary institutions] under Federal law;
> (2) in preparing applications for, and meeting requirements of, applicable programs;
> (3) in order to enhance the quality, increase the depth, or broaden the scope of activities under applicable programs; and,
> (4) in order to encourage simplification of applications, reports, evaluations, and other administrative procedures.

20 U.S.C. § 1231c(a) (1978). Thus, not only is it apparent that Congress has provided funding to colleges and universities that can easily be used to provide interpreter services to deaf individuals, but Congress has also acted to alleviate any unnecessary administrative burden on these institutions. Petitioner's argument that Section 504 imposes undue financial and administrative burdens upon the University fails to consider the aforementioned Congressional action.

B. Federal Rehabilitation Programs for Handicapped Persons

The vocational rehabilitation program has long been viewed by both state and federal officials as a primary source of assistance to disabled students attending institutions of higher education. See Appendix B (survey of New York and Pennsylvania institutions) and Appendix C (letter from Arkansas Rehabilitation Services). In issuing the Section 504 regulations, the current Secretary of HEW stated:

> Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities have expressed concern about the costs of compliance with this provision.

> The Department emphasizes that a recipient can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges and universities. . . .

45 C.F.R. Part 84 Appendix A p. 392 (1979). A federal district court has recently ruled under Section 504 that state rehabilitation agencies must provide support services to eligible handicapped persons attending post-secondary institutions. *Jones v. Illinois Department of Rehabilitation Services,* No. 79C5396 (N.D. Ill. January 12, 1981). The National Association of College and University Business Officers' task force on Section 504 has stated that state rehabilitation agencies are often well-equipped to provide auxiliary aids, such as interpreter and reader services, to post-secondary education students. National Association of College and University Business Officers, "Issues and Answers for Implementing Section 504" (undated).

Finally, the federal Rehabilitation Services Administration and the Office of Post-Secondary Education has issued a policy statement offering guidelines to facilitate coordination between colleges, universities, and state rehabilitation agencies. U.S. D.H.E.W. Memorandum, "Development of Cooperative Agreements Between State Vocational Rehabilitation Agencies and States Associations of Student Financial Aid Administrators Concerning Financial Aid and Other Assistance for Handicapped Students Enrolled In Institutions of Postsecondary Education" (June 22, 1979).

The nation's rehabilitation program, through which the federal government pays 80 percent of a State's total costs, is generally administered through designated state rehabilitation agencies. These agencies are required to provide "vocational rehabilitation services" to eligible handicapped individuals throughout the state. Included within the scope of these services as defined by the Act are "interpreter services for deaf individuals." 29 U.S.C. § 723(a)(6)

(1975). In addition, Congress has specified within this same section that services to individuals enrolled in institutions of higher education are to be within the purview of state designated agencies. 29 U.S.C. § 723(3) (1975).

Handicapped individuals are eligible to receive services under this Act if their disability results in a substantial handicap to employment and if they can reasonably be expected to benefit in terms of employment from the services provided. 29 U.S.C. § 706(7) (1975). Although it does not appear as though the respondent in this case was eligible for services under this program as he was already gainfully employed, it can be assumed that, in most instances, handicapped individuals will be eligible for state rehabilitation services.

Within the 1973 revision of the Act, numerous special projects were established to encourage the development of state services for deaf individuals. Many of these special programs can easily be used to supply support services for deaf individuals enrolled in institutions of higher education. In particular, Section 203 of the Act authorized the Secretary of HEW to make grants and contracts with States and organizations "including institutions of higher education, to pay part of the cost of projects . . . designed to assist in increasing the numbers of personnel trained in providing vocational services to handicapped individuals. . . ." 29 U.S.C. § 763(a) (1975). Specifically encouraged were grants to provide a balanced program of assistance to "specialized personnel in providing services to blind and deaf individuals." 29 U.S.C. 763(b) (1975). Under Title II of the Act, federal grants were authorized for special projects to improve rehabilitation services to "deaf individuals whose maximum vocational potential has not been reached." 29 U.S.C. § 774(b)(1) (1975). Funds were also authorized to establish and operate a National Center for Deaf-Blind Youths and Adults. 29 U.S.C. § 775 (1975).

The most recent amendments to the legislation occurred in 1978 with the enactment of the Rehabilitation, Comprehensive Services and Developmental Disabilities Amend-

ments, P.L. 95-602, 92 Stat. 2984. In addition to continuing the programs described above, Congress again paid particular attention to the needs of deaf individuals. Specifically, in Section 204(b) of the Act, Congress authorized the Director of the Institute for Handicapped Research to establish and support "Rehabilitation Research and Training Centers to be operated in collaboration with institutions of higher education for the purpose of (A) providing training (including graduate training) to assist individuals to more effectively provide rehabilitation services. . . ." Particularly worthy of note in reference to the present case is the statement of Congress that these "grants may include funds for services rendered by such a center to handicapped individuals in connection with such research or training activities." 29 U.S.C. § 762(b)(1) (Supp. 1980).

The most revealing statements of Congressional awareness of the special needs of deaf individuals, however, are found in Title III of the Act. In Section 304(d), Congress authorized the Secretary of HEW to award grants to establish interpreter training programs or to provide financial assistance to on-going interpreter training programs for the purpose of training a sufficient number of interpreters to meet the communication needs of deaf individuals. 29 U.S.C. § 774(d) (Supp. 1980). In Section 305, the Commissioner of Rehabilitation Services is authorized to make grants to state rehabilitation agencies to establish Comprehensive Rehabilitation Centers to provide a broad range of services to handicapped individuals. Of particular relevance is subpart (2) of this section wherein Congress directs that:

> [t]o the maximum extent practicable, such centers shall provide, upon request, to local governmental units and other private nonprofit entities located in the area such information and technical assistance (*including support personnel such as interpreters for the deaf*) as may be necessary to assist those entities in complying with this Act, particularly section 504. [emphasis added]

29 U.S.C. 775(2) (Supp. 1980).

Section 315 of the Act provides additional authorization to the Commissioner of the Rehabilitation Service Administration to make grants to state rehabilitation agencies to:

> establish within each State a program of interpreter services . . . which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals.

29 U.S.C. § 777e (Supp. 1980). This program is particularly designed for an individual in the situation of the plaintiff who appears to be ineligible for traditional state rehabilitation services. Congress directs in subpart (d) of Section 315, that funds provided to a State agency "for any program under the section shall not be used . . . for assistance to deaf individuals who are receiving rehabilitation services under any other provision of this Act." 29 U.S.C. § 777e(d) (Supp. 1980). Thus, by placing such a limitation on the expenditure of funds under this provision, Congress acted with the clear intention of expanding the number of deaf individuals provided services under the Act.

The addition of communication barriers to the list of environmental barriers placed under the purview of the Architectural and Transportation Barriers Compliance Board is further evidence of Congressional intent to bring deaf persons into the mainstream of daily life.[8] Federal assistance was provided under Section 506 (1) whereby the Secretary of HEW, in conjunction with the Architectural and Transportation Barriers Compliance Board, was authorized to provide financial and technical aid "to any public or nonprofit agency, institution, or organization for

[8] Created in 1973, the Board's primary original function was to enforce the requirements of the Architectural Barriers Act of 1968. In 1978, the authority and responsibility of the Board was increased greatly. In particular, the Board was given authority to "investigate and examine alternative approaches to architectural, transportational, *communication* and attitudinal *barriers* confronting handicapped individuals". 29 U.S.C. § 792 (Supp. 1980).

the purpose of assisting such persons or entities in removing architectural, transportation, or communication barriers." 29 U.S.C. § 794b (Supp. 1980).

The acute Congressional sensitivity to the needs of deaf individuals, as reflected in the 1978 amendments, is perhaps best explained by this statement of Representative Jeffords:

> During the past year our understanding and awareness of the deaf and their problems have grown because we have had a man who is totally deaf working part-time on our staff on the Education and Labor Committee. . . . Having [a deaf person] working for Congress made not only members, but staff, very aware of the deaf and much more aware of their capacities as well as their needs. . . . Because of [him], many people have learned how to sign, hearing people who had no prior contact with the deaf are now objective, understanding, and at ease with him.
>
> Having a deaf person in the office makes you aware of the problems that they face first hand. . . . We know that without an interpreter he cannot attend meetings.
>
> 124 Cong. Rec. H3969 (May 16, 1978) (statements of Rep. Jeffords).

C. Federal Program for the Assistance of Persons with Developmental Disabilities

Although the legislative predecessors to the present Developmental Disabilities Assistance and Bill of Rights Act (hereinafter The D.D. Act), 42 U.S.C. § 6000 *et. seq.* (Supp. 1980), focused upon the provision of services to only mentally retarded persons or individuals with neurological disorders such as epilepsy or cerebral palsy, the 1978 amendments to the D.D. Act substantially broadened the definition of developmental disability and, therefore, significantly enlarged the class of handicapped persons intended to be served under the legislation.

42 U.S.C. § 6001(7) (Supp. 1980). Given this expanded definition, many more handicapped persons, including certain deaf individuals, are now eligible for services under the federal-state developmental disabilities programs.

This program has long been viewed as a "gap-filling" measure by both Congress and service providers, thus, making it particularly important in the situation that has arisen in the present case. See 124 Cong. Rec. S 1556 (remarks of Sen. Stafford). In particular, Congress states that one of the specific purposes of the statute is "to assist in the provision of comprehensive services to persons with developmental disabilities, with priority to those persons whose needs cannot be covered or otherwise met under the Education of All Handicapped Children Act, the Rehabilitation Act of 1973, or other health, education or welfare programs; . . ." 42 U.S.C. § 6000(2)(A) (Supp. 1980).

Recently, in *Henkin v. Department of Social Services*, 498 F. Supp. 659 (D.S.D. 1980), a federal district court ruled that the developmentally disabled plaintiff was eligible to have her educational program funded through the state's developmental disabilities program. Specifically, the judge cited the wide variety of programs eligible for funding under the D.D. Act. 498 F. Supp. at 667. In *Henkin*, as in the present case, the plaintiff was ineligible for services under the state rehabilitation program. Educational services, as provided in *Henkin* and as sought in this case, are clearly within the scope of programs that can be funded with D.D. Act monies. 42 U.S.C. § 6001(8) (Supp. 1980).

D. Federal Programs to Assist in the Training of Educational Personnel

A fourth source of federal financial assistance that appears to have been available in the present case to help the University of Texas defray the cost of providing an interpreter to the respondent is several federal programs

designed to support the education of teachers and educational administrators.[9] While these programs have not been created for the express purpose of helping handicapped persons they are particularly relevant to the facts of this case, given the respondent's occupation as the Dean of the Texas School for the Deaf.

Two federal teacher training programs are established under the Higher Education Act of 1965, as amended. The Teacher Training Corp., 20 U.S.C. §§ 1101-1107a (1978), is a unique program through which colleges and universities are encouraged to broaden their programs for training teachers and other educational personnel. Substantial federal funds are allotted to support both the students and teachers enrolled in this program.

The second program established under the Higher Education Act is the Teacher Training Program, 20 U.S.C. § 1119-1119a-1 (1978). Under this enactment, federal grants are awarded to institutions of higher education for the purpose of training individuals to become teachers and administrators. Special emphasis is placed upon the training of teachers to serve educationally disadvantaged children.

[9] Additional assistance is available from a federal loan program, entitled "Direct Loans to Students in Institutions of Higher Education," to be operated for the purpose of "stimulating and assisting in the establishment and maintenance of funds at institutions of higher education for the making of low interest loans to students in need thereof to pursue, their courses of study in such institutions." 20 U.S.C. § 1087aa (Supp. 1980). During the years 1977 and 1978, Congress authorized $1.2 billion for the purpose of making loans under this section. Of particular notice in the present case is a provision for the cancellation of loans issued under this section for certain public service activities — namely, a recipient of such a loan may void his repayment obligations by working a total of five years as a full-time teacher of handicapped children. Under this provision, "handicapped children" are defined as "children who are mentally retarded, hard of hearing, deaf, speech-impaired, visually handicapped, seriously emotionally disturbed or other health-impaired children who by reason thereof require special education." 20 U.S.C. § 1087ee (Supp. 1980).

A third federal funding source to assist in the preparation of educational personnel is directly relevant to the facts as presented in this case. Under the Education Amendments of 1969, P.L. 91-230, 84 Stat. 121, a federal program was established to train personnel for the education of handicapped children. 20 U.S.C. § 1431 (1978). By the operation of this provision, federal funds are available to colleges and universities to assist them "in providing training for personnel engaged or preparing to engage in employment as teachers of handicapped children, as supervisors of such children, or as speech corrections or other special personnel. . . ." 20 U.S.C. § 1431(2) (1978). Given the respondent's employment as the Dean of the Texas School for the Deaf, it appears clear that funds received by the University under this section[10] could have easily been used to supply an interpreter to the plaintiff.

E. In Those Instances Where A Disabled Student Or A College Or University Is Ineligible To Participate In The Federal Assistance Programs Described In This Section, The Ultimate Responsibility For The Provision Of Necessary Auxiliary Aids Falls Upon The Post-Secondary Institution Receiving Federal Financial Assistance.

In enacting Section 504, Congress has, in effect, set certain terms for the disbursement of federal dollars. The power of Congress to impose conditions upon the use of federal funds has long been recognized. See *Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1947) and *King v. Smith,* 392 U.S. 309 (1968). In issuing regulations to implement Section 504, HEW has acted properly to ensure

[10] In November of 1976, the Special Education Department of the University of Texas apparently received substantial funds under this program. During the Respondent's enrollment at the University, this grant was continued. U.S. Office of Education, Grant and Procurement Report, 115 (March 13, 1978).

that these Congressionally-established conditions are not violated by federal fund recipients.[11]

Throughout the nation, colleges and universities have willingly accepted their responsibilities under Section 504 and its regulations. The successes experienced by these institutions conclusively demonstrate that compliance with the regulation at stake in this case, 45 C.F.R. § 84.44(d) (1980), can be accomplished without imposition of undue financial or administrative burdens upon recipients.

The flexibility and reasonableness with which the Section 504 regulations have been drafted has been recognized by the National Association of College and University Business Officers:

> All institutions of higher education should achieve accessibility in their programs and activities. . . . Institutions are encouraged to take full advantage of the flexibility that exists within the Section 504 requirements and to exercise common sense and reasonableness in arriving upon effective approaches to Section 504 compliance. . . .
>
> Institutions are encouraged to remember that accessibility is a process and not a set of arbitrary

[11] As a condition of receiving any federal financial assistance from HEW, applicants for federal funding are required to execute and file an Assurance of Compliance Form with the agency, 45 C.F.R. § 84.5 (1980). This form states that the recipient agrees to comply with Section 504 and the HEW regulations.

In the present case, it was stipulated that the University received some $31,400,000.00 in federal financial assistance. As noted above, "in consideration of and for the purpose of obtaining" this financial assistance, the University contractually assured its compliance with the statute and regulations here at issue. These HEW regulations are certainly specific enough to have put the University on notice of the undertaking to provide auxiliary aids to otherwise qualified handicapped individuals. 45 C.F.R. § 84.44(d) (1979). Thus, the University was clearly bound to provide Camenisch with an interpreter. See *Lau v. Nichols*, 414 U.S. at 568-69. *See generally* R. Cappalli, *Rights and Remedies Under Federal Grants* 28-34, 53-71 (1979).

> requirements. To the extent that institutions develop and implement flexible and effective response mechanisms, they will make major progress toward meeting effectively the needs and requirements of handicapped persons for accessible programs, activities, and services.

National Association of College and University Business Officers, "Issues and Answers for Implementing Section 504" (undated).

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

SUSAN HIRSCH
PENELOPE A. BOYD
ANDREW C. LEHR
A. LEIGH REDMON
Pennsylvania Society for the Advancement of the Deaf
Legal Defense Fund
Suite 525
1700 Walnut Street
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(215) 546-7858
Counsel for Pennsylvania Society for the Advancement of the Deaf

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500 West Baltimore Street
Baltimore, Maryland 21201
(301) 528-6307
Counsel for Amici Curiae

January 28, 1981

APPENDIX A

LETTERS FROM COLLEGES AND UNIVERSITIES DESCRIBING POLICY ON PROVISION OF INTERPRETER SERVICES TO DEAF AND HEARING-IMPAIRED STUDENTS

ALBRIGHT COLLEGE

January 7, 1981

Leigh Redmon
1700 Walnut Street, Suite 525
Philadelphia, PA 79106

Dear Mr. Redmon:

You requested information regarding Albright College's policy and procedures in providing services to handicapped students, particularly deaf students. I am pleased to reply to your request; however, at the present time we do not have any deaf students enrolled, nor have we had any since I have been working with such services. We have had students with other types of handicaps and have been able to accommodate those students.

For our blind students we provide student readers who are paid by the Bureau of the Visually Handicapped, Department of Public Welfare, Commonwealth of Pennsylvania. Faculty and staff are very cooperative in assisting these students. We have had a number of blind students through the years and the feedback from them is very positive.

Albright has made various structural changes and is continuing to improve access to buildings for disabled students. Ramps have been added to entrances and an elevator was installed during renovation of a building; plus other elevators will be incorporated into changes in other buildings.

Not having had deaf students it is difficult to predict all the services needed; however, the use of interpreters would be necessary. Currently several of our students are taking sign language and thus a group like this would provide a resource. As to the funding for interpreters, that has not been defined and would have to be discussed with the appropriate persons.

In my opinion Albright is concerned about its handicapped students and will try to provide all the services necessary for such students to fully function on a college campus.

I enjoyed talking with you and wish you the best in 1981.

Sincerely,

Virginia L. Scullion
Associate Dean of Students

VLS/jb

Boston University

January 7, 1981

Mr. Andrew Penn, Staff Attorney
National Association of the Deaf
Legal Defense Fund
Seventh Street and Florida Avenue, N.E.
Washington, D.C. 20002

Re: *Interpreter Policy Statement of Boston University*

To Whom It May Concern:

As requested, I am offering a factual accounting of the current policy of Boston University regarding providing sign-interpreters for students with severe hearing impairments.

Disabled Student Services (DSS) is a department of Student Life which coordinates the University's long-standing commitment to a mainstreamed participation of disabled students, staff, and faculty in our full campus life.

This ethical commitment was active before the enactment of legislative accessibility requirements of Section 504 of the 1973 Vocational Rehabilitation Act.

At this date approximately six hearing-impaired students, plus one instructor, have identified themselves for currently needing the optional services of DSS. Due to the variety of types and severities of hearing impairments, and consequent specific needs, we consult with each individual separately who approaches us for some type of service. When we find that a hearing-impaired student validly needs a sign-interpreter for a class, we inform the student of what we believe to be our ethical as well as legislative responsibility for funding the interpreter.

Ethically, we believe that all tuition-paying students have the same right of access to academic programs; for the hearing-impaired student in some cases this means the auxiliary provision of an interpreter. Our ethical concerns also extend beyond the classroom, as evidenced by the policy of our Student Activities Office of supplying an interpreter on request for the special lecture series it sponsors.

Legislatively, we find that our previous ethical stance is backed by regulations of compliance to Section 504. In the May 4, 1977 *Federal Register,* commentary pages 22692-3, we find that colleges have the ultimate responsibility for auxiliary aid funding, where the request is validly an institutional responsibility, if it can't be funded elsewhere.

The University has had to fund all valid interpreter needs for which the impaired individual hasn't volunteered personal resources. For FY 79/80, the University spent about $1,500 for interpreter services at an average of $15 per hour for R.I.D. Certified interpreters. This was the third year that we had actually received interpreter requests relating to our long-standing commitment. We expect that our expenditure will increase each year as we hope more hearing-impaired students will come to our campus through our active recruiting program. Certainly

our ethical commitment will continue, regardless of any future reductions of legislative requirements, should they occur for some reason.

Respectfully,

ALFRED H. DE GRAFF
Director

AHD/mv
cc: Henry Beyer, Associate Director
Center for Law and Health Sciences
Boston University

Delaware County Community College

January 7, 1981

Mr. Andy Lehr
Southeast Legal Service for the Deaf
1700 Walnut Street — Suite 525
Philadelphia, PA 19103

Dear Mr. Lehr:

It is the policy of Delaware County Community College to provide certified interpreters in our classes. In addition, we would provide interpreters for other campus activities on an as needed basis.

Very truly yours,

ART SMITH
Coordinator
Services for the Disabled

/d

FORDHAM UNIVERSITY

January 8, 1981

Andrew G. Lehr, Esquire
Southeastern Pennsylvania Legal Services for the Deaf
Suit 525 — 1700 Walnut Street
Philadelphia, Pennsylvania 19103

Dear Sir:

We have not been called upon in the three years of my tenure as Director of Special Services to provide interpreters for any deaf students. We would do so if requested, but our experience has been that most of our hearing impaired or deaf students read lips and can be accommodated with special seating arrangements or they have funding for such services through the Office of Vocational Rehabilitation and pick their own interpretors. If such services were needed funding for it would come out of my budget for special services for the Handicapped.

We currently have 10 hearing impaired students and no deaf students. I am enclosing an article from the recent Time that may be of interest.

Sincerely,
GLENDA U. PALMER,
Director of Services
to the Handicapped.
Fordham University

GUP/lg

New York University

January 14, 1981

Andrew G. Lehr, Esquire
Southeastern Pennsylvania
Legal Services for the Deaf
1700 Walnut Street, Suite 252-1700
Philadelphia, PA 19103

Dear Mr. Lehr,

In response to your questions regarding provision of interpreters, I am providing the following information.

New York University has provided sign language (and now also oral) interpreters for several years. Initially, special endowment monies were used for selected students while other were required to arrange for interpreter services through New York State Office of Vocational Rehabilitation.

For the past two years, NYU has relied on its own resources for financing the interpreter service (where possible, we attempt to recover some expenses from Vocational Rehabilitation). Any hearing impaired student or professor attending an NYU function is eligible for interpreter services.

In July 1980, NYU established the position of Programs Coordinator (in the Office of Disabled Student Services) to administer the interpreter services. The Coordinator's salary is paid from NYU "hard" money. The individual Schools and Departments where interpreters are assigned are billed for the costs of the interpreter services.

The provision of interpreter services and creation of the Coordinator's position were both recommended by the University's President's Committee on 504 (the committee is chaired by the Vice President for Administrative and Student Services). The committee found interpreter services to be a necessary auxiliary aide for compliance with 504. The Coordinator's position was adopted to insure a high quality of delivery of services.

I am enclosing a copy of our policy on interpreter services along with our Student Handbook. The 33 hearing impaired students are the largest identifiable disability group on campus. Last semester we employed thirty freelance interpreters for fifty-three courses (139 hours of interpreting per week) for twenty-six students. The interpreters are paid ten to thirteen dollars per hour. The number of students has risen steadily over the last three years as more students learn about our services.

As for other institutions providing interpreter services, please note the following:

LaGuardia Community College of the City of New York
31 — 10 Thomson Avenue
Long Island City, NY 11101
ATT: Margaret Ranson
(212) 626-2705

Northeastern University, Boston

Long Island University, Brooklyn Center
Flatbush Avenue Extention
Brooklyn, NY 11201
ATT: Natalie Siegelstein, Special Ed. Services

Please feel free to contact me if I can be of further assistance. You may rely on our support in the Camenisch case. Thank you.

Sincerely,

Aron Teel
Programs Coordinator

In order to expedite this letter we are sending the student handbook under a separate cover.

Thank you.

Enc: 2
AT/go

NEW YORK UNIVERSITY POLICY ON INTERPRETER SERVICES

PURPOSE:

New York University, in accordance with Federal regulations, insures that interpreter services are provided for hearing impaired students and faculty. Requests made by hearing impaired students or faculty, or by an office of the University foreseeing a need for interpreter services, are coordinated by the Office of Disabled Student Services (Loeb Student Center, 566 LaGuardia Place, room 701, New York, NY 10012; 598-3320, voice and TTY). The contact person for this service is the Programs Coordinator. The policies and procedures outlined below are provided as a guide for persons providing interpreter services.

RESPONSIBILITIES:

It is the responsibility of feelance interpreters to provide interpreter services for classes and meetings as assigned by the Coordinator, including:

—to convey the message of one speaker to another in the mode of communication preferred by the receiver (Spoken English, Signed English, American Sign Language or Visible English);

—to prepare for each assignment in advance including familiarizing himself/herself with the subject matter and assessing that his/her skills are sufficient;

—an integral part of an assignment is to arrive before the class (or meeting) begins (to meet the principal parties, explain the interpreter's role, insure proper seating and lighting, prepare for movies or other special situations), and to remain at the end of the session for any additional communication between parties (e.g., questions to the professor, feedback to the interpreter);

—to present himself/herself as a professional in appearance and dress;

—to comply with the interpreter's code of ethics (see attached).

Note: The Coordinator is available for purposes of observation.

POLICIES:

1. All assignments are made by the Coordinator. Assignments will be based upon:

—specific skill requirements (communication mode, course content, etc.)

—certification of the interpreter

—dependability and professional attitude/conduct

—performance evaluation

—years of experience

—specific student requests

2. Each interpreter is expected to seek a meeting with the class professor and the hearing impaired student(s) during the first week of class. The meeting will allow for the interpreter to:

—explain his/her role

—clarify the mode of communication to be used

—make special requests (e.g., lighting, seating)

—respond to questions of either party

—request for breaks depending on the type and length of the class

Up to one hour of time (per class) may be billed for these meetings with prior approval of the Coordinator.

3. Cancellations

—one session assignment: An attempt will be made to notify an interpreter at least two working days in advance of any cancellation. Should this not be possible, the interpreter will be paid for the one session assignment.

—full course assignment (Fall and Spring): An attempt will be made to notify an interpreter at least one week in advance of any cancellation. Should this not be possible, the interpreter will be paid for one week's assignment.

NOTE: Cancellations are those instances when a student drops or the University cancels the course.

4. Interpreters are required to report any changes of course hours or rooms to the Coordinator *immediately*.

5. In cases of illness or emergencies, interpreters should contact the Coordinator to arrange for substitutes. When possible, substitution requests should be made at least two full working days in advance of the assignment.

6. For assignments where the hearing impaired person is not present at the beginning of a session, the interpreter should remain fifteen minutes for a one hour assignment and thirty minutes for longer assignments. Inform the Coordinator as soon as possible.

7. Interpreters are responsible for ascertaining at least two weeks prior to the final exam whether their services will be needed. Be sure to discuss the date, time and room in conjunction with the student(s) and instructor. In those cases when an interpreter is present only for beginning instructions, one hour of time may be billed.

8. An evaluation form will be provided each student and instructor near the end of the semester.

9. The Coordinator will evaluate, i.e. observations, as necessary.

COMPENSATION:

1. All interpreters are paid on an hourly basis.

2. The regular hourly rate of pay is $10.00. Interpreters certified by the National Registry of Interpreters for the Deaf (R.I.D.) will receive an hourly rate of pay of $13.00.

3. All applicable taxes including Federal, State, City and F.I.C.A. will be deducted from pay checks.

4. No reimbursement will be made for travel time for assignments.

5. In general, time sheets will be turned in to the Coordinator for approval and processing *every two weeks*. A schedule of dates is available from the Coordinator.

NOTE: Special photo ID cards are available to those interpreters regularly assigned.

PROBLEM RESOLUTION:

Interpreters should make every effort to resolve problems in a professional manner with the individuals involved (e.g., the hearing impaired student, faculty member). In the event the problem is not resolved, the Coordinator and/or Manager is available for advice and consultation.

QUEENS COLLEGE

January 13, 1981

Mr. Andrew G. Lehr, Esquire
Southeastern Pennsylvania Legal Services for the Deaf
Suite 525 — 1700 Walnut Street
Philadelphia, Pennsylvania 19103

Dear Mr. Lehr,

In response to your letter of inquiry on services provided to deaf students, the following is the process we have used thus far:

Deaf students are referred to the Office of Vocational Rehabilitation, who generally pays for the interpreter needs of full time under graduates.

Recently a part time student was denied our sponsorship because he was already employed. The college has been paying for this student with school funds, as is required by federal law. If the student did not suggest an interpreter we would contact the N.Y. society for the deaf for this service.

The interpreter is paid per hour on a monthly basis. Checks are issued by the business office.

There is no written policy regarding interpreters. Policy on compliance with federal regulations is printed in school bulletins and catalogs.

We currently have four deaf students enrolled in classes. We have had an average of two students per year in the past. Until this point all of our students were sponsored by O.U.R.

Deaf students are entitled to all services provided by my office. I am the campus coordinator who provides or coordinates these services.

LaGuardia Community College has full range services for deaf students.

If you require further information please feel free to call.

Sincerely,

Gail Uellendahl

TEMPLE UNIVERSITY

January 7, 1981

Mr. Andy Lehr
Southeastern Pennsylvania Legal Services for the Deaf
1700 Walnut Street
Philadelphia, Pa. 19107

Dear Mr. Lehr:

I understand that you are preparing the brief in the case of "Camenisch v. the University of Texas". I would like to have the opportunity to add a comment since we at Temple University feel very strongly in regard to this matter of providing interpreters for the classroom at no cost to the deaf student. We have been providing and paying for interpreters in the classroom for the past three years and I can certainly attest to the fact that it has not been a hardship for Temple Univerity.

Although there is a large deaf community in Philadelphia, the numbers of profoundly deaf individuals who require interpreters who are able to attend postsecondary institutions will always be relatively small because of their language deficit. It has cost us from two to six thousand dollars per year. We pay for interpreters in the classroom for any full or part time student or for anyone who is taking a workshop for which he is paid a fee. When you consider the fact that we subsidize athletes, chemistry students, physicians, and veterinarians, just to name a few, and that their tuition fees by no means cover the cost of their education, it is somewhat embarrassing to think that the issue of "undue hardship" has even been raised when it comes to providing access to the classroom for deaf students. It is clear that if a student who has paid his tuition in order to attend classes cannot hear what the professor is saying there is, in fact, no access to that class. Although physical and programmatic access for the blind and mobility impaired is somewhat unclear as to scope and is open to a little more individual interpretation, it seems to me to be very clear that an interpreter is, in fact, the voice of the professor. Students are paying tuition in order to receive instruction and the benefit of his expertise and training. It should not cost a deaf student additional tuition for the same opportunity.

Again, may I remind you that we are never talking about large numbers since most deaf students, however intelligent, simply do not have sufficient facility of the language. Those who do should not be further penalized. Temple University is constantly struggling with finances, more so than some other major universities. But the legal and ethical perogatives here seem abundantly clear to us. Should it prove necessary or helpful I would be most happy to testify in this case.

Sincerely,

Dr. Joan Austin
Director,
Office for the Disabled

JA/lf

WASHINGTON UNIVERSITY IN ST. LOUIS

January 19, 1981

Patrick P. Spicer
Developmental Disabilities Law Project
University of Maryland Law School
500 West Baltimore Street
Baltimore, MD 21201

Dear Mr. Spicer:

In connection with your legal efforts related to services for deaf students, I would like to give you some information about our services.

1. Our general policy is to provide such services that are necessary to permit a qualified student to take part in our academic programs. This does not include services of a strictly personal nature (personal care, non-class-related readers, etc.).

2. We have, to date, had no deaf students requiring a sign language interpreter. We have, however, provided an interpreter for a deaf alumnus attending a lecture series in Fine Arts. The usual charge in our area is $10-$15 an hour, plus one-way transportation.

3. Deaf students who lip read have been provided such services as arranging a class schedule with professors most easily "read", arranging for classmates to make duplicate notes, conferring with instructors, etc. No major sums of money have been needed, to date.

4. We have discussed the financial burden an interpreter would be and how this could be handled by a private university like ours, with limited resources. We would explore other sources — vocational rehabilitation, foundations, organizations, etc., as well as the student's own ability to pay. We have also discussed the possibility of teaching students sign language so that they could be used, if needed, and paid through work-study funds. Volunteers would also be welcomed.

I hope this will be of some usefulness to you. Please call or write if I can be of any assistance.

Sincerely,

HAZEL Z. SPRANDEL, PH.D.
Coordinator for the Handicapped

APPENDIX B

SURVEY OF COLLEGES AND UNIVERSITIES IN PENNSYLVANIA AND NEW YORK CONCERNING THEIR POLICIES ON THE PROVISION OF INTERPRETER SERVICES TO DEAF AND HEARING-IMPARIED STUDENTS

COLLEGES AND UNIVERSITIES IN NEW YORK AND PENNSYLVANIA AND INTERPRETER SERVICES

Community College of Philadelphia
Philadelphia, Pennsylvania

> The College has initiated a program of services to handicapped individuals to help overcome barriers to obtaining an education. Services include interpreters for deaf students; volunteer notetakers; readers for visually impaired students; mobility aides; cassette records on loan. Other special services can be arranged on an individual need basis.

Student Handbook at 9.

The Community College of Philadelphia has approximately twenty deaf students. Interpreters for the majority of these students are funded through the state vocational rehabilitation program. The remainder are financed through the College's budget.

Edinboro State College

Edinboro, Pennsylvania

Edinboro State College currently has no deaf or hearing-impaired students. If however, a student was in need of an interpreter, and no other resource, such as state vocational rehabilitation or a private agency were available, the services would be provided through the college's budget.

Edinboro has served deaf students in the past. Since the college is located in a remote region of northwest Pennsylvania and the nearest interpreter referral service is located in Pittsburgh, over one-hundred miles away, students versed in sign language were hired on the student payroll to serve as interpreters.

Delaware County Community College
Media, Pennsylvania

Delaware County Community College provides certified interpreters to those who need them to attend classes. In addition, the College provides interpreters for other activities as needed.

Temple University
Philadelphia, Pennsylvania

Temple University has a uniform policy of providing equal access to the classroom for all handicapped students, including the deaf and hearing-impaired. Any student, whether full or part-time, is provided an interpreter for classroom use. The interpreter is considered to be an arm of the instructor. The University presently has eight full-time and six part-time hearing-impaired students. Interpreters are funded by the University through its development fund.

Drexel University
Philadelphia, Pennsylvania

Drexel University provides interpreters to students as part of its compliance with Section 504 of the Rehabilitation Act. Interpreters are paid by the university as a part

of its budget for handicapped students and is not reflected in the costs of the tuition paid by the deaf student.

University of Pennsylvania
Philadelphia, Pennsylvania

The University of Pennsylvania provides interpreters at the request of hearing-impaired students, although they have no such students enrolled presently. The cost of these services is absorbed by the University, although students are urged to obtain as much outside aid as possible, through vocational rehabilitation funding. The University currently has a private foundation grant to fund the costs of interpreter services not covered by outside sources. When this private money is exhausted, the University will assume the responsibility of payment for interpreter services.

Albright College
Reading, Pennsylvania

Albright College, while it has not had deaf students specifically, has developed a policy of adjusting programs, services and activities to accommodate the handicapped. If necessary, the College will pay for such services at its expense, although state vocational rehabiliation aid would be sought. as it has been effectively used to pay for readers for blind students enrolled at Albright.

LaGuardia College — City College of New York
New York, New York

LaGuardia College, a two-year community college, which is part of the city college system, provides interpreters for deaf students and pays for such services if necessary. A total of ten deaf students are currently enrolled who require interpreters, but all have been eligible for state vocational rehabilitation funding for interpreter services.

The College also administers a program under Title I of the New York State Department of Education to provide

access to continuing education for deaf students. This program includes funding for interpreters and is operated through the LaGuardia College Programs for Deaf Adults. While this program is part of the Continuing Education office, it also provides funding for interpreters in other educational programs at the twelve participating institutions.

Hofstra University
Hempstead, New York

While Hofstra University currently has two hearing impaired students, no student has been in need of interpreter services to date.

State University of New York, College of Arts & Sciences Geneseo, New York

The State University of New York's College of Arts and Sciences has about four hearing-impaired students. All the students needing interpreter services have been funded through the state office of vocational rehabilitation.

Widener College
Chester, Pennsylvania

The Student Affairs Office of Widener College would provide interpreters for deaf students as the need arises. While Widener has no deaf students at this time, it will continue its policy of accommodating handicapped students. In the event a deaf student requires an interpreter, the student must seek the service through the state vocational rehabilitation program. If the student is not eligible for these services, the college will provide an interpreter at its own expense.

Bucks County Community College
Doylestown, Pennsylvania

Bucks County Community College provides and pays for interpreters for deaf students who request them. The interpreters are paid for by means of a line item in the budget. The College has had a maximum of three to four

students per semester. Some have not requested interpreter services.

Montgomery County Community College
Blue Bell, Pennsylvania

Montgomery County Community College will furnish interpreters to deaf students. The college has one deaf student presently, who has not requested an interpreter.

State University of New York, College at Brockport
Brockport, New York

The State University of New York's College at Brockport will pay for an interpreter service if an individual is not covered by the state vocational rehabilitation agency. The College at Brockport currently has three deaf students enrolled.

Fordham University
Bronx, New York

Fordham University has not yet been asked to provide an interpreter for deaf students. The University reported that the needs of its deaf and hearing-impaired students have been met, to date, by special seating to permit speech reading or by use of interpreters funded through the state vocational rehabilitation program. The University's budget includes special services for the handicapped which would absorb the cost of interpreters. Fordham has ten hearing impaired students enrolled at this time.

Queens College of the City University of New York
Flushing, New York

Queens College currently has four deaf students, and has averaged two deaf students per year in the past. Until this year the College was not faced with the question of payment of interpreters, as all the services needed by deaf people were paid for through the state vocational rehabilitation agency. This year, when a student was denied this funding, the College absorbed the costs of the interpreter services.

New York University
New York, New York

New York University provides and pays for interpreters for deaf students by means of the college budget. The University has had a steady increase in the number of deaf students enrolled, from about fifteen in 1978 to thirty in 1980.

The University does not view the costs of interpreter services as excessive for a large institution such as N.Y.U. and that it has not suffered undue costs or problems as a result of its program.

AFFIDAVIT

I, Andrew G. Lehr, hereby affirm that the foregoing information is accurate to the best of my information, knowledge, and belief, under penalty of perjury.

ANDREW G. LEHR
Staff Attorney
Southeastern Pennsylvania
Legal Services for the Deaf
Suite 525
1700 Walnut Street
Philadelphia, PA 19103

Arkansas Department of Human Services

APPENDIX C

STATEMENT OF POLICY OF ARKANSAS DEPARTMENT OF HUMAN SERVICES, DIVISION OF REHABILITATION SERVICES, CONCERNING THE PROVISION OF INTERPRETER SERVICES TO DEAF AND HEARING-IMPAIRED STUDENTS IN INSTITUTIONS OF HIGHER EDUCATION.

December 18, 1980

Andy Penn
National Center for the
Law and Deaf
7th and Florida Avenue, N.E.
Washington, D.C. 20201

Dear Mr. Penn:

I am enclosing a copy of a letter from our Commissioner, E. Russell Baxter, to the Presidents of state supported colleges and universities. I am also enclosing Program Instructions from RSA on "Interim Policy Statement on the Provision by VR Agencies of Educational Auxiliary Aids for Handicapped Students in Postsecondary Educational Institutions As Related to Section 504 of the Rehabilitation Act."

Our two years of experience with that special fund provided by the State Legislature has been very positive. For the first time, we've actually had large numbers of deaf students remaining in the State for college training. The same request will be made for the next biennium.

RSA continues to study State Agencies' responsibilities regarding payment for interpreters in postsecondary edu-

cational institutions. You may wish to contact Martin Spickler in the RSA Office for more information.

Please let me know if I can provide additional information.

Yours very truly,

GLORIA KEMP, Deputy Commissioner
REHABILITATION SERVICES — OFFICE
FOR THE DEAF AND HEARING IMPAIRED

GK/da
cc: E. Russell Baxter
Martin Spickler

STATE OF ARKANSAS
DEPARTMENT OF HUMAN SERVICES

August 17, 1979

Dear

In order to assist state supported colleges and universities in carrying out their responsibility to provide access to educational information to students who are deaf or severely hearing impaired or who are blind or severely visually handicapped, the Legislature included a special provision in the current Appropriation Act to the Division of Vocational Rehabilitation. For the fiscal year ending June 30, 1980, $48,100 was appropriated for providing telecommunication equipment for the use of deaf students for each state supported college and university and for providing interpreter services to approximately eight deaf students. For the same period, $52,500 was appropriated to establish a resource center for the use of the blind students at each state supported college and university and for providing reader services to approximately ten blind students. For the fiscal year ending June 30, 1981, $59,450 was appropriated to provide interpreter services for approximately ten deaf students and provide reader services to approximately ten blind students. Since 5% of the current year's appropriation has been impounded, the

total sum currently available for disbursement prior to June 30, 1980, is $95,570.

Any state supported college or university desiring assistance under this program should make application to me by letter indicating (1) the type and cost of equipment desired; (2) the arrangements which will be made for the use of the equipment to assure its accessibility and preservation; and (3) the number of deaf and hearing impaired persons and the number of blind and severely visually handicapped students currently enrolled and the number of students anticipated for the remainder of the fiscal year. The letter of application should also indicate by students the number of hours and the cost for interpreter services for the deaf and reader services for the blind.

It is important to note that the funds provided in this appropriation may be used for providing interpreter services and reader services only for students who are not presently clients of the Vocational Rehabilitation Program. The cost of interpreter and reading services for these clients will be met by this agency as a direct case service cost.

When a letter of application has been received providing the necessary information, a letter of authorization will be issued. After the equipment has been purchased or the interpreter or reader service provided, proof of payment should be submitted to my office and the college or university will be promptly reimbursed in accordance with the authorization and expenditure report. The college or university may collect quarterly for interpreter and reader services.

Initially, funds available for the purchase of telecommunication equipment for the deaf and resource center equipment for the blind such as video magnifiers, braille writers, and tape recorders will be tentatively apportioned among 19 state supported colleges and universities on an equal basis, i.e. $2,550 per school. If any college or

university does not wish to participate in the program or wish a smaller sum, the savings thus accomplished can be made available to colleges and universities wishing additional appropriate equipment. Funds for interpreter services and reader services will be approved on an individual student basis until available funds are exhausted.

The staff of the Office for the Deaf and Hearing Impaired and our Office for the Blind and Visually Impaired will be available to provide you with consultation and assistance in the preparation of your request for equipment and in the recruitment of interpreters. If you need assistance for information concerning interpreter services or equipment for deaf students, contact Gloria Kemp, Deputy Commissioner, Office for the Deaf and Hearing Impaired at 371-2502. For information concerning equipment or reader services for the blind students, contact Lou Rives, Deputy Commissioner, Office for the Blind and Visually Impaired at 371-2587.

The suggested hourly rates or payment for interpreters for the deaf for classroom settings are $7.50 an hour for a manual interpreter ($10.00, if CSC Level); $6.50 per hour for an oral interpreter and from $3.00 to $5.00 per hour and notetakers, depending on the individual college or university's pay scale for such services. There are no set fees for reader services for the blind. These services are generally provided by other students and the cost does not usually exceed the hourly minimum wage.

We look forward to cooperating with you in this opportunity to increase educational opportunities for deaf and blind students.

Sincerely,

E. Russell Baxter, Commissioner
DIVISION OF REHABILITATION SERVICES

ERB/da

cc: Gary Chamberlin
Lou Rives
Gloria Kemp
Lewis Urton
Don Thurman
Vince Bond
Harold Williams
Vernon Glenn

MOTION FILED
DEC 18 1980

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-317

UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

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October Term, 1980

No. 80-317

UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES FOR LEAVE TO FILE BRIEF AMICI CURIAE

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) move this Court for leave to file the accompanying brief as *Amici Curiae* supporting the petitioners, The

University of Texas *et al.* In support of this motion, ACE and NIICU show as follows:

1) The American Council on Education (ACE) and the National Institute of Independent College and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia.

2) Founded in 1918, the ACE is a voluntary membership organization composed of 1,401 nonprofit institutions of higher education from both the public and private sectors and 178 educational associations and organizations. NIICU's membership consists of approximately 800 independent, non-public colleges, universities and educational associations.

3) The ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the overwhelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

4) Most of ACE's and NIICU's members operate federally assisted education programs subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

5) Accordingly, ACE's and NIICU's members have a direct interest in the primary substantive issue presented for the Court's consideration in this case: whether under Section 504 and this Court's ruling in *Southeastern Community College v. Davis,* colleges and universities that receive federal aid are required to procure and compensate interpreters for hearing impaired graduate students.

6) Because of their interest in issues involving the proper interpretation of Section 504 and the implementing administrative regulations ACE and NIICU both filed briefs as Amicus Curiae in this Court in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979). On other occasions, ACE and NIICU have been granted permission by this Court to file briefs as *amicus curiae. See, e.g., Forsham v. Califano,* 445 U.S. 169 (1980); *Cannon v. University of Chicago,* 441 U.S. 677 (1979); and *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 34 (1978).

7) The written consent of counsel for the petitioners to the filing of this brief has been filed with the Clerk of the Court. Counsel for the respondent indicated that he would not consent, thereby necessitating this motion.

Wherefore, it is respectfully moved that the ACE and NIICU be granted leave to file the accompanying brief *amici curiae* in this case.

Respectfully submitted,

R. CLAIRE GUTHRIE
SHELDON ELLIOT STEINBACH
Attorneys for Amici
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 833-4741

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) are nonprofit corporations organized under the laws of, and located in, the District of Columbia. Founded in 1918, the ACE is a voluntary membership organization composed of 1,401 nonprofit institutions of higher education from both the public and private sectors and 178 educational associations and organizations. NIICU's membership consists of approximately 800 independent, non-public colleges, universities and educational associations.

The ACE is the nation's major coordinating body in postsecondary education. NIICU's mission is to provide a unified national voice for independent higher education in the shaping of public policy. As organizations whose members include the overwhelming majority of four-year colleges and universities, ACE and NIICU are uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

Most of ACE's and NIICU's members operate federally assisted education programs subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Accordingly, ACE's and NIICU's members have a direct interest in the primary substantive issue presented for the Court's consideration in this case: whether under Section 504 and this Court's ruling in *Southeastern Community College v. Davis,* colleges and universities that receive federal aid are required to procure and compensate interpreters for hearing impaired graduate students.

STATEMENT OF THE CASE

Prior to enrolling in graduate courses at The University of Texas at Austin in 1977-78, Respondent, an individual with a severe hearing impairment, asked both The University and the Texas State Rehabilitation Commission for funds to pay sign language interpreters to assist him in all his classes. The Rehabilitation Commission refused his request because it said Respondent did not have a "substantial employment handicap." The University denied him funds because it said Respondent did not have need for financial assistance as determined under The University's standard formula for awarding student financial aid.

As a result of these denials of assistance, Respondent filed a complaint and motion for preliminary relief against The University and several of its officers asking, under Section 504 of the Rehabilitation Act of 1973 and the Fourteenth Amendment to the United States Constitution, that The University be ordered to provide free interpreter services to Respondent. The trial court determined, without reaching the merits of Respondent's claim and without explanation, that there was a substantial likelihood Respondent ultimately would prevail on the merits under §504. Accordingly, without reaching Respondent's constitutional claim, it entered an order requiring The University to procure and compensate an interpreter for Respondent.

The University of Texas appealed entry of this preliminary order to the Fifth Circuit Court of Appeals. The Court of Appeals narrowly reviewed the district court's order to determine whether the court abused its discretion in entering the preliminary injunction, and it sustained the lower court's action.

In reviewing the merits of Respondent's claim to determine his likelihood of ultimate success, the Fifth Circuit examined the regulations of the Department of Health, Education and Welfare (HEW) and the Supreme Court's decision in *Southeastern Community College v. Davis.* The Court of Appeals found that the HEW regulations imposed "strict liability" on The University to provide Respondent with free interpreter services, and it determined, under *Davis,* that the regulatory requirement did not constitute an affirmative action obligation unauthorized by Section 504.

SUMMARY OF ARGUMENT

The Supreme Court held in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), that Section 504 of the Rehabilitation Act of 1973 only prohibits discrimination against qualified handicapped persons and does not require recipients of federal aid to assist handicapped persons in overcoming their disabilities. Nonetheless, the Fifth Circuit Court of Appeals decided in this case, *Camenisch v. The University of Texas, et al.,* 616 F.2d 127 (1980), that Section 84.44(d)(1) of the Department of Health Education and Welfare's 504 Regulation, 45 C.F.R. Part 84 (1979), imposed an absolute requirement on The University of Texas to procure and compensate a sign language interpreter for a deaf graduate student.

The Fifth Circuit's interpretation of the Departmental regulation is not supported by the language of the provision at issue. Moreover, the Court of Appeal's holding conflicts with the Supreme Court's decision in *Davis* because it operates to establish an affirmative action obligation not authorized by the statute. Finally, the Fifth Circuit's decision fails to accord proper consideration to the reasonableness of the accomodation requested and the nature of the hardship such an accomodation would impose on the operation of The University of Texas' program—both of which considerations are necessary to a determination whether The University engaged in handicap discrimination prohibited by Section 504.

ARGUMENT

I.

THE NONDISCRIMINATION REQUIREMENT OF SECTION 504 DOES NOT IMPOSE ON THE UNIVERSITY OF TEXAS AN OBLIGATION TO PAY THE COSTS OF SIGN LANGUAGE INTERPRETERS FOR A DEAF GRADUATE STUDENT PARTICULARLY WHERE THE STUDENT HAS NOT MADE A SHOWING OF FINANCIAL NEED.

A.

Section 84.44(d)(1) of the §504 Regulation does not require the University of Texas to provide at no cost the services of sign language interpreters.

The Fifth Circuit Court of Appeals held without explanation that the following regulation of the Department of Health, Education and Welfare (HEW) required The University of Texas to provide Walter Camenisch, a deaf graduate student, with a free sign language interpreter in each of his classes:

> A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills. 45 C.F.R. §84.44(d)(1)(1979).[1]

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[1] *Camenisch v. The University of Texas,* 616 F.2d 127 (1980).

The court's interpretation of the regulation is not required by the language quoted above, and it conflicts with the Supreme Court's holding in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979).

On its face, §504 prohibits only discrimination based "solely" on a person's handicap.[2] Section 84.44(d)(1) of the implementing regulation explicitly requires only that a college or university that is a federal aid recipient take "such steps as are *necessary to ensure* a handicapped student is not denied the opportunity to participate in its programs "because of the absence of educational auxiliary aids."

In the instant case, the record shows Mr. Camenisch was not discriminatorily denied the opportunity to attend The University of Texas because interpreter services were unavailable. In fact, the record demonstrates that The University of Texas took all the necessary steps required by the regulation to ensure Walter Camenisch would have the interpreter services he said he needed.

In the summer of 1977, Walter Camenisch asked both The University of Texas at Austin and the Texas Rehabilitation Commission to provide funds to meet the costs of sign language interpreters for classes in which he intended to enroll the following winter and spring semesters. Paragraphs 11 and 12 of Plaintiff's Verified Complaint (Civ. Action No. 78-061 filed March 1, 1978). In October 1977, the Texas Rehabilitation Commission informed Mr. Camenisch it would not provide him with such funds because he did not have "a substantial employment handicap." Paragraph 12 and Exhibit 3 of Plaintiff's

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[2] 29 *U.S.C.* §794 (1976).

Verified Complaint (Civ. Action No. 78-061 filed March 1, 1978). The University of Texas at Austin referred Mr. Camenisch to its Office of Student Financial Aid to discuss his need for financial assistance. In October 1977, The University informed Mr. Camenisch it would not provide the funds he requested for interpreter services because he had failed to meet the University's standard criteria for provision of financial aid. Paragraph 11 and Exhibit 22 of Plaintiff's Verified Complaint (Civ. Action No. 78-061 filed March 1, 1978).

These facts demonstrate that, contrary to the Fifth Circuit's finding, Mr. Camenisch was not discriminated against within the meaning of §504 or denied services required by the implementing regulations. To the extent Mr. Camenisch did not have the interpreter services he needed, it was because he refused to pay for them, or because the state vocational rehabilitation agency refused to pay for them, not because The University of Texas failed to meet its obligation not to discriminate against him *"solely"* by reason of his handicap.[3]

Amici are sensitive to the fact that since Section 504 was passed many state rehabilitation agencies, like the one in the instant case, have narrowly interpreted their responsibilities to provide services authorized by other provisions of the Rehabilitation Act of 1973 and have denied many students in higher education rehabilitation services they need. Clearly, this was not the result intended by HEW when it published the 504 Regulation.

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[3]The Supreme Court has held previously that where wealth is involved the Constitution does not require "absolute equality or precisely equal advantage" even with respect to compulsory elementary education. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). This suggests it is not inappropriate in this case to treat Respondent differently because of his financial circumstances.

In analyzing the requirements of Section 85.44(d) of the Regulation, the Department stated explicitly its understanding that:

> recipients can usually meet this obligation [to take the steps necessary to ensure the availability of auxiliary aids] by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges and universities." Analysis of Final Regulation, Appendix A, 42 *Fed. Reg.* 22676, 22692-3 (1977).

This expectation was underscored in the required[4] inflationary impact statement published with the proposed §504 rule and later updated.[5]

In the impact statement, the cost of providing services (including auxiliary aids) under the "Higher Education" part of the Regulation, Subpart E, was not estimated because it was assumed to be "negligible." 41 *Fed. Reg.* 20312, 20365 (1976):

> . . . It is not expected that Subpart E, which requires nondiscrimination in recruitment, admissions, and provision of courses and noncurricular services, will impose any significant additional costs.

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[4]Exec. Order 11,821, 39 *Fed. Reg.* 41501 (1974).

[5]Dave M. O'Neill, *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance,* 41 *Fed. Reg.* 20312 (1976); updated but not published May 1977 (available on request from HEW).

> Paragraph [(d)] of section 84.44 provides that a recipient must ensure that no qualified handicapped student with impaired communicative skills be denied effective participation in its program because of lack of necessary auxiliary educational aids. (Individually prescribed or general purpose aids such as eyeglasses or wheel chairs are not, of course, included). In many cases, this provision will not impose any additional financial burden because the aids are provided by vocational rehabilitation agencies. 41 *Fed. Reg.* at 20360-61.

Despite these assumptions a bureaucratic conflict within the Department of Health, Education and Welfare—a conflict within the Secretary's power to resolve—has resulted in many state rehabilitation agencies refusing to provide the expected rehabilitation services and auxiliary aids. Last year a task force that included representatives of higher education and handicapped individuals described the frustrating situation that currently confronts colleges and universities and their handicapped students as follows:

* * *

> The secretary [of HEW] evidently promulgated the auxiliary aid requirement based on an assumption that resources from his own department [specifically from state rehabilitation agencies funded by HEW's Rehabilitation Services Administration] would be available at a certain level. They are not, and HEW's failure to rectify this situation leaves students, higher education administrators, and rehabilitation personnel alike unsure of the department's com-

mitments to higher education for handicapped persons.

Federally financed rehabilitation programs are a major source of financial support for handicapped persons. Availability of such services can be determinative in successfully financing higher education for individual students; . . .state rehabilitation agencies often can provide auxiliary aids more economically, and from a basis of wider knowledge and expertise, than can thousands of individual educational institutions. Yet there now exists a situation wherein [the Office for Civil Rights of the Rehabilitation Services Administration of HEW,] and state rehabilitation agencies acquiesce in or actively promote the following barriers to service for handicapped students in higher education:

• Application of the "similar benefits" provision of section 101(a)(8) of the Rehabilitation Act [of 1973], to relieve rehabilitation agencies of all responsibility for students in higher education, on the grounds that section 504 makes institutions of higher education responsible for the "first dollar" of resources for them—despite the fact that section 101(a)(8) was enacted many years before section 504 and for purposes unrelatd to it, [and despite the fact that Title V of the Act did not authorize services as did Titles I-III (see discussion pp. 17-18, *infra.*)] . . . .

• [Discretionary] application of "needs" tests in [state] rehabilitation programs that are not coordinated with student financial aid needs test administered by institutions. . . .

- Application of discretionary authority in the Rehabilitation Act to disfavor students in higher education as a class of rehabilitation services beneficiaries.

- Application of discretionary authority in the Rehabilitation Act to disfavor graduate and post-baccalaureate professional students as a class of rehabilitation services beneficiaries, with particular adverse impact upon students who do not continue their post-baccalaureate education directly from undergraduate study.

- A wide variety of differences in rules and levels of benefits among state rehabilitation agencies, particularly as to "portability" of rehabilitation benefits for study outside the provider state.

- Application by some state rehabilitation agencies of low funding maximums which strongly favor the lower tuition costs of state colleges (for obvious state interests) to the degree that students are being discouraged financially from considering the alternative of independent education.

* * *

National Association of College and University Business Officers (NACUBO) Task Force on Secton 504, *Issues and Answers,* July 1979 NACUBO BUSINESS OFFICER 12, 20-21.

The fact that contrary to HEW's stated assumptions, auxiliary aids are not being provided by state vocational rehabilitation agencies does not justify the Fifth Circuit's finding that Section 84.44(d) of the HEW Regulation

obligates all colleges and universities that receive federal aid to bear the total costs of such services. Such a finding would, at a minimum, require a complete reassessment of the inflationary impact of Subpart E of the 504 Regulation[6] In addition, it would raise a serious question of the validity of the regulation under the standards set forth in the Supreme Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979).

B.

Any administrative regulation that would under the facts of this case, require The University of Texas to provide free interpreter services would constitute an "unauthorized extension of the obligations imposed by the statute."

"It is elementary that [t]he starting point in every case involving the construction of a statute is the language itself [citation omitted]." 442 U.S. at 405. The language of Section 504 provides no assistance in determining whether, under *Davis,* the HEW has exceeded its authority in publishing §84.44(d) of the §504 Regulation if that provision is interpreted to impose an obligation on colleges and universities to provide free interpreter services. Section 504 of the Rehabilitation Act of 1973 provides in full:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 29 U.S.C. §794 (1976).

[6]Executive Order 11,821, 39 *Fed. Reg.* 41501 (1974).

It is arguable this language is so vague as to vest "virtually unfettered" discretion in the Executive Branch thereby warranting a finding that the Act represents an "unconstitutional delegation of legislative power." *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).[7] At a minimum, it is stating the obvious to say one

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[7]The view that the statute is a prime example of "delegation running riot", 295 U.S. at 553 (concurring opinion of Cardozo, J.), is reinforced by the following excerpts from the Notice of Intent to Issue Proposed Rules published by the Department of Health, Education and Welfare on May 17, 1976:

> Because the concepts underlying Section 504 were new and complex and few judicial precedents existed in the area, the very general language of the statute creates serious problems of interpretation. There is almost no substantive legislative history surrounding the development and enactment of Section 504. There were, for example, no public hearings accompaying the original bills, and there was almost no substantive floor debate. Only in December 1974, during passage of the Rehabilitation Act Amendments, did Congress attempt to clarify its intent in enacting Section 504 and to articulate this intent in a manner which could be used by the Department as guidance in its efforts to administer the Act.
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> * * *
>
> There is no legislatively directed scheme of enforcement such as those provided in Sections 602 of Title VI of the Civil Rights Act of 1964 and 902 of Title IX of the Educational Amendments of 1972. To fill the legislative void, Executive Order 11914 was issued which, among other things, supplies the directive for specific enforcement procedures and sanctions for noncompliance, all of which are based on precedents from these other statutes. In addition, it provides for a general enforcement scheme under which the Secretary of Health, Education, and Welfare is assigned responsibility to coordinate the Federal government's implementation of Section 504. In the absence of legislative mandate as to the form of administration of Section 504 and prior to the issuance of E.O. 11914, it fell to this Department, as a granting agency, to develop a

must look beyond the words of the law to determine whether Congress intended Section 504 to be read as imposing an auxiliary aids requirement on all universities that receive federal aid.

In *Southeastern Community College v. Davis, supra,* the Supreme Court examined the language and structure of the Rehabilitation Act of 1973 and concluded

> . . .neither the language, purpose nor history of §504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. 442 U.S. at 411.

Just as it was helpful in *Davis* to look at the other provisions of the 1973 Rehabilitation Act in reaching the conclusion Section 504 does not require affirmative action, it is useful in determining the intended scope of the nondiscrimination requirement to review these provisions as well as other Congressional actions regarding the accommodation of handicapped students in education programs.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et seq.*, as amended by the Rehabilitation Act Amendments of 1974, contains five subchapters: Subchapter I (29 U.S.C. Sections 720-750) provides for federally financed vocational rehabilitation services; Subchapter II (29 U.S.C. Sections 760-764) provides for federally financed

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means of assuring compliance with the prohibitions of the provision.

The most important problem which has hindered the development of the regulation is the constant need to weigh competing equities while resolving complex issues. Thus, while we recognize that the statute creates individual rights, the statute is ambiguous as to the specific scope of these rights.

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41 *Fed. Reg.* 20296 (1976).

research and training to aid the handicapped; Subchapter III (29 U.S.C. Sections 770-776) provides for federally financed special services and facilities for the handicapped; Subchapter IV (29 U.S.C. Sections 780-787) provides for administration and evaluation of the various programs established in Subchapters I through III; Subchapter V (29 U.S.C. Sections 790-794) is entitled "Miscellaneous Provisions" and includes Section 503, dealing with affirmative action in employment under federal contracts and Section 504 dealing with nondiscrimination under federal grants.

Section 504 makes no mention that recipients of federal financial assistance are to provide special services for the handicapped, nor does it authorize federal money to finance any such special services. Indeed, there is no mention of such services or federal services anywhere in Subchapter V. On the other hand, Subchapters I through III are replete with programs providing special services to the handicapped and financing, with federal funds, the provisions of such services. The fact that the provision of services to the handicapped is covered in Subchapters I through III of the Act, and that the provisions of Section V pertaining to nondiscrimination make no mention of provision of services, reasonably only can be construed to mean that Congress did not intend in Section 504 to shift to educational institutions that receive federal aid the financial responsibility for providing special services to the handicapped.

Any other reading of the Section 504 regulations would conflict with the stated purposes of the Rehabilitation Act. The statement of Congressional purpose which prefaces the Rehabilitation Act of 1973 says:

> "The purpose of this chapter is to provide a statutory basis for the Rehabilitation Services Administration, and to *authorize programs* to—

> "(1) develop and implement comprehensive. . . *state plans* for meeting the . . .needs for providing vocational rehabilitation services. . .
>
> * * *
>
> "(6) initiate and expand service to groups of handicapped individuals. . ." 29 U.S.C. Section 701 (emphasis added).

The special services that the Fifth Circuit decision would require colleges to provide the handicapped are not part of an "authorized program" under the Rehabilitation Act. On the other hand, the services that the appellate decision would obligate colleges to pay for *are* included in the authorized programs concerning grants to the states:

> "The purpose of this subchapter [I] is to authorize grants to the States to meet the. . . needs of handicapped individuals, so that such individuals may prepare for an engage in gainful employment."

And, as provided elsewhere in Subchapter I,

"Vocational rehabilitation services provided under this chapter [include]:

> "(6) interpreter services for deaf individuals. . ." 29 U.S.C. Section 723(6).

Thus, Congress demonstrated it knew how to require state rehabilitation agencies receiving direct federal aid to provide interpreters to the deaf. Had it intended Section 504 to be read to obligate all recipients of federal assistance to provide such services (even where the assistance is unrelated to the provision of such services), it would have indicated clearly that was the case. According-

ly, the HEW regulations requiring general federal aid recipients to be the providers of special services to the handicapped are beyond any authority delegated to HEW to interpret and enforce the section.

Subsequent legislation passed by Congress only confirms the validity of this argument. In 1975, two years after it passed Section 504, Congress enacted into law the Education of the Handicapped Act, Public Law 94-142.[8] The stated purpose of this act was

> . . .to assure that all handicapped children have available to them, within the time periods specified in Section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[9]

The time frame specified as a condition of eligibility for assistance under the Act was as follows:

> . . .a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged

[8] 20 *U.S.C.* § 1401, *et seq.* (1976).

[9] 20 *U.S.C.* § 1401(3) (1976).

> eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law practice, or the order of any court, respecting public education within such age groups in the State. . . . 20 U.S.C. §1412(2)(B).

The term "special education" used in the statute was defined to mean

> . . .specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. §1401(16).

When the Department of Health, Education, and Welfare first proposed the §504 nondiscrimination rules now enforced by the Department of Education, it clearly chose to interpret Section 504 as establishing substantive requirements for elementary and secondary school recipients of federal aid that were identical to those set forth in the Education of the Handicapped Act of 1975.[10] Section 84.33(a) of the final rules, 45 C.F.R. Part 84 (1979), stated generally that compliance with Section 504 in elementary and secondary schools meant the provision of a free appropriate education regardless of the nature or severity of a particular individual's handicap. An "appropriate education" was defined to mean.

> . . .the provision of regular or special education and related aids and services that (i) are designed to meet the individual needs of handicapped persons as adequately as the needs of

[10] 42 *Fed. Reg.* 22676, 22682 (1977).

> handicapped persons are met. . . . 45 C.F.R. §84.33(b)(1)(i) (1979).

It is clear from the chronology of the enactment of the two legislative rules Congress could not have intended such an identity of requirements.

The general rules of statutory interpretation require the assumption Congress is aware of its prior legislative action when it passes a new law[11] If Congress intended Section 504 to be read as the Education Department suggests, one would have to assume Congress knowingly passed redundant legislation two years later. The flexible time frame allowed for compliance with the more recently passed Education of the Handicapped Act cited above reduces such a suggestion to an absurdity.

Section 504 of the Rehabilitation Act did not include any language that suggested a delay in its effectuation would be necessary or appropriate. The final rules issued by HEW were effective a month from the date they were published in 1977. With the exception of a transition period for making buildings accessible,[12] the Department's final rule countenanced no delay in compliance. There is no suggestion in the Education of the Handicapped Act of 1975 of a conflict with the requirements of Section 504. Yet, if the HEW's regulatory interpretation of Section 504 is accepted, a federal recipient which met the time frames of the 1975 statute would be out of compliance with Section 504 and subject to having terminated under §504 any grants it received under the Education of the Handicapped Act of 1975.

Obviously, Congress could not have intended such a result. Therefore, in passing the Education of the Handicapped Act of 1975, Congress must have believed it was imposing new obligations not mandated by the non-

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[11] *Cannon v. University of Chicago*, 441 U.S. 677, 697 (1979).

[12] 45 *C.F.R.* § 84.22 (d) (1979).

discrimination requirement of Section 504. These new obligations included the requirement that elementary and secondary schools provide to their handicapped students special services unique to their needs including "corrective and other supporting services" that would include the provision of sign language interpreters. 20 U.S. C. §1401(17). To the extent Congress in passing Section 504 did not intend to require the provision of special services such as interpreters to handicapped persons in elementary and secondary schools, it seems unlikely Congress intended Section 504's nondiscrimination provision to require colleges and universities routinely to provide such aids at no cost to students.

This view is reinforced by the fact that public elementary and secondary education in this country is both free and compulsory in nearly every circumstance.[13] The same generally cannot be said for higher education. In addition it has been argued that the availability of an free public school education is essential to the meaningful exercise of constitutionally guaranteed rights such as the right to vote.[14] This has never been said of higher education. Therefore, even if Congress did intend through Section 504 to assure a free, appropriate elementary and secondary education to all handicapped persons, it does not necessarily follow that Congress intended Section 504 to require all colleges and universities that are federal aid recipients to absorb any and all additional costs associated with providing educational service to a deaf student.

In the instant case, the record shows that the University of Texas at all times accommodated Respondent Camenisch's handicap by allowing an interpreter in the

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[13]KIRP AND YUDOF, EDUCATIONAL POLICY AND THE LAW 1-10 (1974) ("In all but two states, American children are legally obliged to attend school,")

[14]*San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 35-36 (1973).

classroom (R., Vol. II, p. 12) and by adding to the standard student budget used in calculating a student's financial need the extra expenses incurred by Mr. Camenisch by reason of his hearing impairment. (R., Vol. II, p. 5). Such actions assured that Mr. Camenisch was not arbitrarily excluded by the University from participating in the degree program of his choice. The nondiscrimnation requirement of Section 504 requires nothing more.

II.

THE NONDISCRIMINATION REQUIREMENT OF SECTION 504 DOES NOT IMPOSE ON THE UNIVERSITY OF TEXAS AN OBLIGATION TO DO MORE THAN MAKE REASONABLE ACCOMMODATION TO THE KNOWN HANDICAPS OF ITS STUDENTS.

In this case, the Court of Appeals held that The University of Texas could be excused from providing respondent Camenisch with sign language interpreters only if it could show Mr. Camenisch could not successfully perform in his chosen profession. 616 F.2d at 133. This is an unnecessarily overboard reading of the statute and regulations that imposes on colleges and universities strict liability for meeting all the potential educational needs of their handicapped students without regard to the reasonableness of the accommodations needed or their costs. That the statute does not require this result is amply demonstrated by the Department's own regulations and by the Supreme Court's decision in *Davis*.

Without any additional guidance than is provided on the face of the 504 statute, the Department of Health, Education and Welfare concluded with respect to employees that the reasonableness of a necessary accommodation could be taken into account in deciding whether

a particular handicapped individual is "qualified" for a job. 45 C.F.R. §84.3(k)(1) (1979). At the same time, HEW defined a "qualified handicapped person" with respect to postsecondary education services as an individual who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45 C.F.R. §84.3(k)(3)(1979).

Although, HEW's failure to include in the postsecondary education provision quoted above any reference to accommodation could be said to support an argument no accommodation need be made,[15] to date it has been interpreted by the Department and, apparently, the Fifth Circuit to mean handicapped students must be accommodated without regard to reason or cost. The Supreme Court's decision in *Davis* suggests that such a "strict liability" requirement is not supported by the language or the spirit of the statute, and is an example of an unauthorized extension of the requirements of the Rehabilitation Act.

As the Supreme Court recognized in *Davis,* there are circumstances in which some action beyond mere neutrality may be required of federal recipients under the nondiscrimination requirements of Section 504:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. . . . [S]ituations may arise when a refusal to modify an existing program might become unreasonable and discriminatory. 442 U.S. at 412.

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[15]In fact, Congress' failure to include language in the statute requiring accommodation has been used to support an argument that Section 504 does not require federal recipients to make any accommodation to individual handicaps. *See,* Brief for Equal Employment Advisory Committee as *Amicus Curiae* at 22-27, *Southeastern Community College v. Davis,* 442 U.S. 397 (1979).

Although the Court said it is the responsibility of the Department of Health, Education and Welfare, and consequently its successor enforcement agency the Department of Education, to identify those situations in which a refusal to accommodate would constitute discrimination, 442 U.S. at 413, it gave some guidance regarding the factors it would consider in drawing the line between nondiscrimination under §504 and affirmative action. In addition, the Court indicated there are substantial reasons why the Department's interpretations of Section 504 are entitled to less deference than is normally accorded agency interpretations of federal statutes, 442 U.S. at 411 n. 11, which reasons support rejection of the unlimited accommodation requirement imposed by the Fifth Circuit in this case.

Language in the Court's opinion in *Davis* shows the Court recognized compliance with Section 504 might involve "some costs". 442 U.S. at 412. At the same time, the Court quite clearly indicated there is a limit on the expense that must be incurred in the name of nondiscrimination. The opinion of the Court speaks of future events that might someday allow accommodation of handicaps "without imposing undue financial and administrative burdens on a State." 442 U.S. at 412. The opinion goes on to state that should those events take place there *might* arise situations "where a refusal to modify an existing program *might* become unreasonable and discriminatory." 442 U.S. at 412.

In light of these statements that obviously assume some balancing of costs and benefits is appropriate under Section 504, it is clear Subpart E of the §504 Regulation, 45 C.F.R. §§84.41-84.50 (1979), which governs postsecondary education programs must at a minimum be read to incorporate the reasonable accommodation/undue hard-

ship provisions included in Subpart B, 45 C.F.R. §§84.11-84.20 (1979), governing employment practices.

This means that in the instant case the first question that should be asked in addressing the merits of Walter Camenisch's claim to interpreter services is whether provision of such services would constitute a reasonable accommodation. One test of whether provision of such services would be reasonable is whether there are other less burdensome alternatives that would enable Mr. Camenisch to obtain equally effective benefits from the educational "services" provided by The University.[16] A careful and particularized analysis of the nature of Mr. Camenisch's handicap and the courses in which he desired to enroll would be necessary to make this determination.[17] Examples of alternative accommodations that might be deemed "reasonable" include provision of notetakers, access to the instructor's lecture notes, and/or special tutoring.

Even if The University and Mr. Camenisch agreed that provision of interpreters would constitute a reasonable accommodation, the Subpart B employment analysis permits an additional assessment of the hardship that might be imposed on the operation of the recipient's program by providing such an accommodation. Section 84.12(c) of the §504 Regulation sets forth the criteria to be considered in determining whether, in the employment context, a particular accommodation might impose an undue hardship:

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[16]A service or aid must be "equally effective" for the program to be nondiscriminatory under the Regulation, 45 *C.F.R.* § 84.4(b) (2) (1979).

[17]To be "equally effective" an aid need not produce an identical result but must only afford the handicapped person an equal opportunity to obtain in the most integrated setting appropriate to his needs the same benefit offered a nonhandicapped person. 45 *C.F.R.* § 84.4 (b) (2) (1979).

> 1) The overall size of the recipients program with respect to the number of employees, number and type of facilities and size of budget;
>
> 2) The type of the recipient's operation, including the composition of the recipient's workforce and
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> 3) The nature and cost of the accommodation required. 45 C.F.R. §84.12(c) (1979).

Although some modification of these criteria would be appropriate before using them to assess undue hardship in the context of the provision of educational services, they do provide some guidance regarding the proper application of the concept.

The cost of providing interpreter services to a deaf person enrolled as a full-time student has been estimated to be about $4,000 a year.[18] Whether such an expense would impose an undue hardship on The University of Texas depends either on facts regarding The University's size, facilities and resources that are not on the record or on a legal judgment that $4,000 would, as a matter of law, be "undue."

In *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), the Court said, for purposes of the analogous reasonable accommodation requirement added in 1972 to the religious discrimination prohibition of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(j), that anything more than a *de minimis* expenditure would constitute an undue hardship. Even though the *Hardison* case

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[18] *See, e.g., California State University Policy for Providing Services to Students with Disabilities,* SA 80-17 and BA 80-14 (yearly allocations to each state college include $4,000 for each hearing impaired student).

required delicate balancing of the free exercise and establishment clauses of the first amendment, it is important to note that, even in the face of clear and express Congressional intent to impose an accommodation requirement, the scope of that requirement was very narrowly defined by the Supreme Court. Any accommodation requirement imposed by Section 504, which on its face only requires nondiscrimination – not affirmative action, accommodation or preferential treatment – should be similarly limited.

CONCLUSION

This Court should affirm its decision in *Southeastern Community College v. Davis* and hold that the nondiscrimination requirement of Section 504 does not obligate a covered university to procure and compensate a sign language interpreter for a deaf graduate student where that student is able to pay the costs. Alternatively, this court should instruct the Fifth Circuit that the reasonableness of an accommodation and any hardships it imposes must be considered in determining whether the nondiscrimination provision has been violated.

Respectfully submitted,

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NO. 80-317

In The Supreme Court Of The United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners

v.

WALTER CAMENISCH,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* AND BRIEF OF THE DEAF COUNSELING, ADVOCACY AND REFERRAL AGENCY, INC., NORTHERN CALIFORNIA CENTER ON DEAFNESS, INC., GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., DEAF RESOURCES AND REFERRAL AGENCY OF MARIN, NATIONAL GRAY PANTHERS ACCESS TASK FORCE, ST. BENEDICT'S CENTER FOR DEAF AND HARD OF HEARING, DISABILITY LAW CENTER, LEGAL AID SOCIETY OF ALAMEDA COUNTY, WESTSIDE COMMUNITY FOR INDEPENDENT LIVING, INC., DARRELL MCDANIEL INDEPENDENT LIVING CENTER, INC., DISABLED RESOURCE CENTER, INC., COMMUNITY REHABILITATION SERVICES, EAST SAN GABRIEL SERVICES FOR THE DISABLED, COMMUNITY SERVICE CENTER FOR THE DISABLED, RESOURCE AND EDUCATION NETWORK FOR THE EQUALITY OF WOMEN WITH DISABILITIES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, WESTERN LAW CENTER FOR THE HANDICAPPED, CATHOLIC SOCIAL SERVICES OF SAN FRANCISCO, HANDICAPPED RESOURCE CENTER, DAYLE MCINTOSH CENTER FOR THE DISABLED, NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, *AMICI CURIAE* URGING AFFIRMANCE

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NO. 80-317

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,

v. Petitioners

WALTER CAMENISCH

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE DEAF COUNSELING, ADVOCACY AND REFERRAL AGENCY, INC., NORTHERN CALIFORNIA CENTER ON DEAFNESS, INC., GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., DEAF RESOURCES AND REFERRAL AGENCY OF MARIN, NATIONAL GRAY PANTHERS ACCESS TASK FORCE, ST. BENEDICT'S CENTER FOR DEAF AND HARD OF HEARING, DISABILITY LAW CENTER, LEGAL AID SOCIETY OF ALAMEDA COUNTY, WESTSIDE COMMUNITY FOR INDEPENDENT LIVING, INC., DARRELL McDANIEL INDEPENDENT LIVING CENTER, INC., DISABLED RESOURCE CENTER, INC., COMMUNITY REHABILITATION SERVICES, EAST SAN GABRIEL SERVICES FOR THE DISABLED, COMMUNITY SERVICE CENTER FOR THE DISABLED, RESOURCE AND EDUCATION NETWORK FOR THE EQUALITY OF WOMEN WITH DISABILITIES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, WESTERN LAW CENTER FOR THE HANDICAPPED, CATHOLIC SOCIAL SERVICES OF SAN FRANCISCO, HANDICAPPED RESOURCE CENTER, DAYLE McINTOSH CENTER FOR THE DISABLED, NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, AMICI CURIAE URGING AFFIRMANCE.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

TO: THE SUPREME COURT OF THE UNITED STATES

Deaf Counseling, Advocacy and Referral Agency, et al., respectfully move for an order granting leave to file a brief amici curiae in this case pursuant to Rule 36 of the Supreme Court Rules of 1980. Consent of the attorneys for respondent has been filed. Consent of the petitioners has been refused.

INTERESTS OF THE AMICI CURIAE

Amici are representative of a broad range of organizations located in California, which are working to ensure that handicapped people are more fully integrated into the mainstream of our society. For purposes of description, they may be broken down into three specific categories.

First, five of the organizations provide various social services, such as counseling and job placement, primarily to the deaf and hearing impaired.

In addition, they seek, through education and advocacy, to advance and protect their clients' opportunities for and interest in greater access to society's institutions. Some of these organizations are membership organizations while others are not. All provide services to non-members as well as members.

Second, twelve of the organizations work primarily with the mobility impaired. Some of these groups are also membership organizations. Some of them provide various social services to their clients. They all seek to advance and protect the interests of handicapped people through education and advocacy.

Third, four of the organizations provide direct legal services to handicapped people, and in addition, seek to advance and protect their clients' opportunities for and interests in greater access through legal back-up efforts and litigation.

The Court's interpretation of the meaning of Section 504 in this case will have significant effect on the rights and lives of the members and clients of amici just as this Court's interpretation of Section 504 did in Southeastern Community College v. Davis, 442 U.S. 397 (1979). The holding in that case has had a widespread effect on this nation's disabled and has affected their progress toward equality of access and opportunity.

Specifically, amici are concerned about the issues raised in the petition for certiorari in this case. The requirement of appropriate accommodation under Section 504 is critical to providing greater access for the disabled. A private right of action under Section 504 is vital to amici, especially since federal enforcement efforts are inadequate at best. Finally, a narrow interpretation of Section 504 in terms of the programs

or activities it covers will severely restrict the application of its command not to discriminate and will make enforcement more difficult, whether through administrative efforts or litigation.

QUESTIONS ADDRESSED BY THE AMICI

1. Whether Section 504 of the Rehabilitation Act of 1973 requires recipients of federal funds to make expenditures required to provide access to disabled people?

2. Whether a private right of action exists under Section 504?

3. Whether, to be protected under Section 504, a disabled student must show that the particular class in which he is being discriminated against is receiving direct federal financial assistance?

AMICI'S ASSISTANCE TO THE COURT

Besides a brief argument addressed to question one above, amici will cover in

detail questions two and three above, as the latter are not covered in detail in respondent's brief. Amici will also present the Court with information on how the State of California provides services to disabled students attending the public postsecondary schools to help them comply with Section 504.

For the foregoing reasons, this motion for leave to file a brief as amici curiae should be granted.

Dated: January 27, 1981

Respectfully submitted,

By: _____
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BRIEF OF AMICI CURIAE URGING AFFIRMANCE

SUMMARY OF ARGUMENT

I. Section 504 requires reasonable accommodation to the needs of disabled persons to insure their access to federally funded institutions. This Court's ruling in Southeastern Community College v. Davis, 442 U.S. 397 (1979), approved the requirement to accommodate. The holding focused on the issue of student qualifications for acceptance to an educational program. Walter Camenisch was qualified for the classes he attended.

Section 504 was enacted to ensure the complete integration of handicapped individuals into the normal living and working patterns of society and the provision of a sign language interpreter for deaf people aids in that integration.

The accommodation requirement of Section 504 is consistent with and pattern-

ed after other Civil Rights legislation, notably Title VI of the 1964 Civil Rights Act, under which this Court has ruled that accommodations may be necessary.

Although the protection of individual rights should not turn on a cost analysis, the provision of a sign language interpreter represents an insubstantial financial burden to the University of Texas.

The provision of a sign language interpreter for Walter Camenisch is essential and fully consistent with the goals of the Rehabilitation Act of 1973. Without an interpreter he would be denied access to the education he needs for his employment.

II. A private right of action exists under Section 504 because all four factors established by this Court in Cort v. Ash, 422 U.S. 66 (1975), are met by that section, and because the analysis of this Court in Cannon v. University of Chicago, 441 U.S. 677

(1979), is applicable to Section 504. Section 504 was enacted for the benefit of disabled people, a group which includes Walter Camenisch, and it created a federal right in favor of that group. There is explicit and implicit evidence of legislative intent to create a private right of action under Section 504. A private right of action is consistent with and essential to the underlying purpose of Section 504. Finally, the question of an implied right of action under Section 504 is an appropriate one for the federal courts to decide.

Exhaustion of administrative remedies is not required in this case because the administrative procedure available under Section 504 is inadequate to protect Walter Camenisch's right as a disabled individual to be free from discrimination. In addition, Walter Camenisch was under time pressure to complete his classes.

Because the administrative process under Section 504 has no provision for ordering immediate compliance by a recipient, Camenisch could not have completed it in time to attend his classes.

The doctrine of primary jurisdiction is not appropriate here.

III. Section 504 and the regulations passed thereunder, 45 C.F.R. § 84.41, provide that the requirements of the law extend to "programs or activities" and recipients receiving federal financial assistance.

Although this Court has yet to rule on the reach of "program or activity," lower court decisions involving educational institutions and student beneficiaries have adopted a "unified entity" rather than a "pin-point" approach to determining the coverage of Section 504. In addition, the purpose of Section 504 and the regulations passed thereunder are broad in their

applicability and define the reach of Section 504 to programs or activities and recipients of federal financial assistance. Adopting a pin-point approach to Section 504 coverage would mean that significant parts of federally funded universities would be outside Section 504's reach and therefore not required to be accessible to the handicapped. Such an unreasonable result is fraught with both logical and practical difficulties that would shackle enforcement efforts and leave unprotected the intended beneficiaries of Section 504.

ARGUMENT
I.

SECTION 504 OF THE REHABILITATION ACT OF 1973 REQUIRES THE UNIVERSITY OF TEXAS TO PROVIDE A SIGN LANGUAGE INTERPRETER FOR WALTER CAMENISCH BECAUSE THAT ACCOMMODATION, INSUBSTANTIAL FOR THE UNIVERSITY, WILL ALLOW CAMENISCH FULL AND EQUAL ACCESS TO THE UNIVERSITY'S CLASSES.

A. Section 504 Requires Recipients of Federal Funds, such as the University of Texas, to Accommodate Qualified Handicapped Individuals, such as Camenisch.

1. This Court's opinion in Davis supports an accommodation requirement.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), this Court recognized that Congress intends recipients of federal financial assistance to accommodate the needs of qualified disabled people.

The Court held that the deaf student applicant was unqualified to participate in Southeastern's nursing program and therefore not an intended beneficiary of Section 504. Id, at 414. In arriving at that conclusion,

the Court was careful to distinguish between affirmative action obligations, such as those required by Sections 501(b) and 503(a) of the Act, and the duty to accommodate under Section 504.[1] Therefore, "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." 442 U.S., at 412-413. It is just such a situation that Walter Camenisch has faced. There is no dispute here that he is fully qualified to participate as a student in the University of Texas' academic programs. The dispute is whether or not there is a violation of Section 504 when the University refuses to make available a sign language interpreter so that Walter Camenisch, who is deaf, can participate in those programs. Amici will

[1] The Department of Health, Education and Welfare (HEW) regulation implementing Section 504, which requires, when necessary, the provision of auxiliary aids, such as interpreters, for deaf students, is 45 C.F.R. § 84.44

demonstrate, in Part I.B., infra, that the University's refusal is unreasonable and discriminatory.

2. Public policy supports an accommodation requirement.

The obligation to accommodate the needs of disabled persons is fully consistent with the goals of the Rehabilitation Act of 1973. To secure the "final objective" of the "complete integration of all individuals with handicaps into the normal community living, working, and service patterns," White House Conference on Handicapped Individuals Act of 1974, P.L. 93-516, 88 Stat. 1631 29 U.S.C. § 701 note, the 1973 Act seeks "to develop and implement, through research, training services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. § 701. In furtherance of this goal, the Act "authorizes grants to assist States to meet the current and future needs of handi-

capped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." 29 U.S.C. § 720(a).

Accommodating Walter Camenisch's deafness by providing him with the services of a sign language interpreter is precisely the kind of action that will result in attaining the goals of the Act because this one accommodation allows Walter Camenisch to participate fully and equally in an educational program that he must complete in order to seek and retain his employment.

Without such an accommodation, the cost burden falls on the already disadvantaged Camenisch. The result is he is forced to either spend more to participate in the University's classes than his fellow hearing students or to forego the remainder of his post graduate education entirely. Any financial barrier that is placed on a handicapped person can only serve,,

at the very least, to inhibit and discourage his "complete integration" into the community --a result that is the exact antithesis of the Act's goals.[2]

On the other hand, state units such as the University of Texas, are easily able to absorb the "occasional" costs of accommodation.

In the long run, of course, the benefits that accrue to a society that not only allows but also encourages its less productive members to become more productive far outweighs the short term costs of the accommodations needed to make that happen.[3]

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[2] Based partly on its finding that "the primary responsibility for meeting the challenge and problems of individuals with handicaps has often fallen on the individual or his family," Congress wanted "all levels of Government to necessarily share responsibility for opportunities for individuals with handicaps." 29 U.S.C. § 701 note.

[3] Sponsors of the Rehabilitation Act of 1973 estimated that of the twenty-two million physically handicapped adults in the United States, approximately fourteen million would be able to work if given the opportunity. 118 Cong. Rec. 3321 (1972).

There have been several cost/benefit analyses conducted of the vocational rehabilitation program, and although differing with respect to the methods used, the studies have agreed that the benefits of the rehabilitation program outweigh its costs from three to five to one. S. Rep. No. 93-318, 93d Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2076, 2085.

3. The accommodation requirement is consistent with other similar civil rights legislation.

Section 504 is patterned after earlier civil rights legislation prohibiting different kinds of discrimination in federally funded programs. See, e.g., Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin) (Title VI); Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex) (Title IX).[4]

In Lau v. Nichols, 414 U.S. 563 (1974), this Court held, in a Title VI matter, that a local school district was required to take affirmative steps to rectify the English language deficiency of its students of Chinese ancestry. Id., at 568-569. Thus, the Court has already held that accommodations may be necessary to provide disadvan-

[4] For the text of Title VI, see footnote 12, infra. For the text of Title IX, see footnote 13, infra.

taged students with a meaningful opportunity to participate in an educational program receiving federal funds. This case provides the Court with a similar opportunity to ensure equality of educational access--an opportunity amici submit it must take.

Walter Camenisch's disability provides an even stronger case for accommodation than the language deficiency of the children in Lau because the nature of the disability is fundamentally different. Camenisch cannot overcome his hearing loss by learning to hear so that he may understand the spoken words of his teachers and therefore effectively participate in the University's academic program. Camenisch relys on sign language for spontaneous communication and thus he will always require an interpreter in the classroom.

B. Requiring the University to Provide an Interpreter for Walter Camenisch is Fully Consistent with Section 504.

1. For the University, the required accommodation to Camenisch is insubstantial.

Unlike the circumstances in the Davis case, there need be no modification of the University's educational program to make the accommodation for Walter Camenisch. Furthermore, there is no question that interpreter services to make classroom communication effective are not services of a personal nature contemplated by the HEW regulations. 45 C.F.R. § 84.44(d)(2).

The financial burden, if any, on the University is insubstantial.[5] The cost of providing an interpreter for the summer courses Walter Camenisch needed to attend to complete requirements for a master's

[5] In addition, the administrative burden for the University to either simply pay for an interpreter already secured by Camenisch or even to secure and contract for one of its own does not appear significant.

degree was, at most, a few hundred dollars.[6]

On the other hand, the University is a major public institution of a large state, having a yearly budget in the hundreds of millions of dollars. A significant portion of this budget, $31.4 million, is provided by the federal government. In addition, the University, as a state institution, has the resources of the Texas government behind it.[7]

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[6]Furthermore, the likelihood in this case is that the University has few other deaf students for which it would be required to provide interpreters from its own budget. In his brief, Walter Camenisch points out that, besides the state's vocational rehabilitation agency, several other potential funding sources for interpreter services are available to the University. However, the record is devoid of any indication that the University undertook to tap any of these sources or, indeed, undertook any attempt to provide interpreter services for Camenisch.

[7]The University of Texas' apparent financial concerns are unfounded especially in light of the fact that other states have made a significant commitment to the disabled. Since 1979, California for example has allocated funds to all of its public postsecondary education institutions for the specific purpose of providing services to handicapped students. Budget Act of 1979, 1979 Cal. Stats., ch. 259. As a result, it is now possible for virtually any disabled person who is enrolled at

[footnote continued]

Beyond the fact that the cost of the sign language interpreter here is insubstantial, amici submit that the facilitation of communication, which is an

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one of the state's public institutions of higher education to receive the support services that the student may require to fully participate in the school's academic program, including the provision of sign language interpreters at nc cost to the deaf student.

California has a strong commitment to providing access to the disabled as expressed in its many access laws. See, e.g., Cal. Lab. Code § 1412 (opportunity for employment without handicap discrimination declared a civil right), Cal. Gov't. Code § 19230 (state policy to encourage and enable the disabled to participate fully in the social and economic life of the state), Cal. Civ. Code §§ 54-55.1 (full access to public places), Cal. Gov't. Code § 4450 et seq. (access standards for public buildings), Cal. Gov't Code §§ 11135 et seq. (handicap discrimination prohibited for recipients of state funds). California has taken the position that,

> [T]he duty not to discriminate imposed by the statute implies a corresponding duty to reasonably accommodate the special needs of handicapped persons in order to neutralize the effect of any disabling condition. [And therefore a] prohibition against discrimination in college admission is meaningless if a student can't get through the door or have lecture materials translated into usable form.

Brief of Amicus Curiae of the State of California in Support of Respondent, Southeastern Community College v. Davis, 442 U.S. 397 (1979).

essential educational component, is of such high priority, that its provision should not be subject to any cost-first determination.

> 2. An interpreter is necessary for Walter Camenisch to obtain his master's degree in order to retain and advance in his employment.

The University agrees that without the services of an interpreter, Walter Camenisch could not successfully participate in and complete the University's academic program.

The educational process demands full and unhindered communication to be effective.[8] HEW recognized this fact when it required the provision of auxiliary aids:

> In drafting a regulation to prohibit exclusion and discrimination, it becomes clear that different or special treatment of handicapped persons . . . may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to 'admit' a handicapped person in a wheelchair to a

[8] For a discussion of the role of communication in the education of deaf people, see D. Moores, Educating the Deaf (1978)

> program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instructions.

42 Fed. Reg. 22675, 22676 (May 4, 1977).

Thus, an interpreter for a deaf student can be as essential an educational component as a teacher is to any student. In providing the latter, the University should be required to provide the former where necessary.

To similar effect is this Court's observation in Lau v. Nichols, 414 U.S., at 566: "We know that those who do not understand English are certain to find their classroom experience wholly incomprehensible and in no way meaningful." The very same conclusion obtains for those who cannot hear spoken English. Whereas special instruction may be necessary to overcome the communication

gap for non-English speaking minorities, sign language interpreters may be necessary to overcome the communication gap for deaf students.[9]

The importance of the University's academic program to Camenisch is also clearly evident. Without a master's degree he would lose his position as acting dean of students at the Texas School for the Deaf.[10] Camenisch's participation in the University's academic program then, is wholly consistent with and in furtherance of the goals of the Rehabilitation Act of 1973 to "enhance opportunities to rehabilitate the handicapped or otherwise

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[9] Not all deaf students will require sign language interpreters. See D. Moores, Educating the Deaf 268, 269 (1978).

[10] Beyond loss of employment, the high value placed on an advanced degree in today's labor market is well known. It cannot be denied that a master's degree would otherwise help Camenisch in obtaining and advancing his career goals.

In the context of racial discrimination in education, this Court some time ago recognized the importance of education in today's society. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

to qualify them for some useful employment." Southeastern Community College v. Davis., 442 U.S., at 412.

II.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT SECTION 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE CAUSE OF ACTION IN FAVOR OF HANDICAPPED PERSONS.

The question presented here is whether, under the test developed in Cort v. Ash, 422 U.S. 66(1975), this Court may properly conclude that a private right of action is implied under Section 504.[11] The

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[11] The Cort test considers the following factors: First, is the plaintiff one of a class for whose benefit the statute was enacted--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any evidence of legislative intent, explicit or implicit, either to create a remedy or to deny one? Third, is an implied right of action consistent with the underlying purposes of the legislative scheme? And fourth, is the cause of action one traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See Cannon v. University of Chicago, 441 U.S. 677, 688 n. 9 (1979).

It is important to note that section 504 was passed in 1973, two years before the Cort case was decided.

answer is that all four factors of the Cort test are completely satisfied and thus, an implied private right of action exists under Section 504.

A. This Court Should Apply the Same Private Right of Action Analysis to Section 504 That it Applied to Title IX of the Education Amendments of 1972.

This Court's analysis of a private right of action under Title IX in Cannon v. University of Chicago, 441 U.S. 677 (1979), applies equally to the facts of this case. Virtually every factor considered important by this Court in Cannon is present in an analysis of whether a private right of action exists under Section 504. This Court can easily say that Section 504 like Title IX, "presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present." Id., at 717.

1. Section 504 was unquestionably enacted for the benefit of a special class of which Walter Camenisch is a member and creates a federal right in favor of him.

The language of Section 504 is almost identical to the language of Titles VI[12] and IX[13] which this Court held created a federal right.

> With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. 441 U.S., at 690 n. 13.

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[12] Section 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[13] In relevant part, § 901, 86 Stat. 373, as amended, set forth in 20 U.S.C. § 1681, provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

2. There is evidence of legislative intent, both explicit and implicit, to create a private right of action and no evidence of any intent to deny one.

This Court pointed out in Cort v. Ash, 422 U.S., at 82, and Cannon v. University of Chicago, 441 U.S., at 694, that it is not necessary to show an intention to create a right of action in a statute which has granted a class of persons certain rights as long as there is no evidence of a legislative intent to deny one.[14]

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[14] The University's argument that Congress' failure to include handicapped persons under the protections of Title VII, 42 U.S.C. § 2000e, evidences an intention to deny a private right of action, is without merit. Petitioner's brief, at 14. Bills may fail in Congress for many reasons which this Court has never undertaken to guess at. See Cort v. Ash, 422 U.S., at 83 n. 14. In 1978, Congress did act to apply the remedies of Title VI to Section 504. In many ways that is more reasonable than applying the remedies of Title VII, since both Title VI and Section 504 are general non-discrimination provisions, while Title VII applies only to employment. Furthermore, this Court held in Cannon that Congress understood Title VI to create a private right of action, 441 U.S., at 703, so that adopting the remedies of Title VI as opposed to Title VII does not show any intention to deny a private right of action.

There is much evidence that Congress intended to grant a private right of action when it drafted Section 504 in 1973, and again when it amended the Section in 1978. Section 504, like Title IX, was patterned after Title VI.[15] As was true for Title IX and noted in Cannon, by the time Section 504 was enacted in 1973, "Title VI [had]

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[15] This has been noted by a Senate Committee Report:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964 . . . and Section 901 of the Education Amendments of 1972 . . . . The language of Section 504, in following the above-cited Acts. further envisions the implementation of a compliance program which is similar to those Acts . . . . This approach to implementation of Section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation and permit a judicial remedy through a private action.

S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 6373, 6390-6391 (emphasis added).

already been construed as creating a private remedy." 441 U.S., at 696. In addition, Congress had included Title VI in Section 718 of the Education Amendments which authorized the payment of attorney's fees in private actions. 441 U.S., at 699; Section 718, 86 Stat. 369, codified in 20 U.S.C. § 1617.

By 1973, therefore, Congress had demonstrated its understanding that Title VI created a private right of action. The fact that it patterned Section 504 after Title VI indicated an intention to grant a private right of action under Section 504.

During the years preceding 1973, this Court had decided several implied-cause-of-action cases under other statutes, 441 U.S., at 698 nn. 22 & 23. It was reasonable for Congress to assume, therefore that Section 504 would be interpreted in the same way.

In recent amendments Congress had further clarified its intention to grant a private right of action under Section 504. The 1978 amendments provide for attorney's fees in private actions and apply the remedies available under Title VI to Section 504.[16]

The Section 504 amendment to grant attorney's fees is analogous to the 1976 amendments to 42 U.S.C. § 2000d which granted attorney's fees in private actions under Title IX. This Court noted in Cannon that such an amendment was evidence that Congress believed a private right of action

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[16]The relevant portions of the amendments provide that:

> (a)(2)The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under section 794 of this title.
>
> (b)In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. §§ 794(a)(2), (b) (Supp. 1979).

existed. 441 U.S., at 686 n. 7. The same is true for Section 504.[17] This Court has long adhered to the principle that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. E.g., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

Legislative history of those amendments indicates that several members of

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[16] The University has argued that Congress' failure to include Section 504 under the Civil Rights Attorneys Fee Awards Act of 1976, 90 stat. 264, suggests that Congress did not intend to grant a private right under Section 504. Petitioner's Brief, at 15. The language of this Court in Cannon is applicable here,

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.

441 U.S., at 711.

In addition, Congress' authorization of attorneys fees in the 1978 amendments to Section 504 makes clear its intention to grant a private right of action under that section,

Congress understood that a private right of action was available under Section 504.[18]

This Court stated in Cannon in reference to similar remarks that, "[a]lthough we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within 'the civil rights enforcement scheme' that successive Congresses have created over the past 110 years." 441 U.S., at 687 n. 7. Amici submit that the Court would be equally remiss in ignoring these expressions concerning the scope and purpose of Section 504.

The federal circuits which have considered this issue all have found an

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[18] See, e.g., 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978) (remarks of Senators Bayh and Cranston); S. Rep. No. 95-820, 95th Cong., 2d Sess. 19 (1978) S. Rep. No. 93-1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6390-91.

implied right of action under Section 504.[19]

In addition, this Court has impliedly approved a private right of action under Section 504 in Campbell v. Kruse, 434 U.S. 808 (1977), where it remanded the case to

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[19] Kling v. County of Los Angeles, D.C. No. 79 2615 (9th Cir. December 8, 1980); NAACP v. Medical Center, Inc., 584 F. 2d 619 (3d Cir. 1978); Davis v. Southeastern Community College, 574 F. 2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Trageser v. Libbie Rehabilitation Center, Inc., 590 F. 2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979) (with limitations on actions for employment discrimination); Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977); Leary v. Crapsey, 566 F. 2d 863, 965 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F. 2d 413, 415 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F. 2d 296, 299 (2d Cir. 1977).

The University cites language from Simpson v. Reynolds Metals Co., Inc., 629 F. 2d 1226, 1229-30 (7th Cir. 1980), in arguing that this Court should not follow the reasoning of Lloyd. Petitioner's Brief, at 12. It is important to note that the Simpson court found a private right under the facts of that case and noted that the administrative remedies under the HEW regulations probably would not be adequate under the standards set out by this Court in Cannon. 629 F. 2d, at 1231 n. 7.

Several district court holdings are also of note. See Whitaker v. Board of Higher Education, 461 F.Supp. 99, 106-109 (E.D.N.Y. 1978); Drennon v. Philadelphia General Hospital, 428 F.Supp 809 (E.D.Pa. 1977); Vanko v. Finley, 440 F.Supp. 656 (N.D. Ohio 1977); Sites v. McKenzie, 423 F.Supp. 1190 (N.D.W.Va. 1976).

the district court to be decided under Section 504 instead of on equal protection grounds.

As this Court indicated in Cannon, Congress' failure to specifically deny a private right of action in light of these court decisions shows that it at least acquiesces and apparently affirms those decisions. 441 U.S., at 703.

All of these factors show that there is sufficient legislative intent under the Cort standard to confer a private right of action under Section 504.

3. A private right of action is consistent with and essential to the underlying purpose of the legislative scheme of Section 504.

The purposes of Section 504 are the same as those for Titles VI and XI: To stop discriminatory practices and to provide individual citizens with effective protection against those practices.[20]

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[20]See S.Rep. No. 1297, 93d Cong., 2d Sess., [footnote continued]

The HEW regulations for Section 504 adopt the procedural provisions applicable to Title VI, and therefore, as under Titles VI and IX, allows only for the termination of federal funds to a recipient as a remedy for discrimination under the Section. 45 C.F.R. § 80.6 - 80.10; Whitaker v. Bd. of Higher Educ. of the City of New York, 461 F.Supp. 99, 107 - 108 (E.D.N.Y. 1978).

This Court said in Cannon:

> True, this Court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available . . . . But it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute . . . .

441 U.S., at 707 n. 41.

reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6388. See also Kampmeier v. Nyquist, 553 F.2d, at 299 (2d Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1285 n. 25 (7th Cir. 1977).

The Whitaker court concluded that the administrative process under Section 504 did not provide an adequate remedy to fulfill the purpose of the section. 461 F.Supp., at 108. This Court should decide here as it did in Cannon, that the remedy of termination of federal funds is,

> severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred . . . . Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with--and in some cases even necessary to--the orderly enforcement of the statute.

441 U.S., at 705-706.

Contrary to the University's argument, HEW has consistently supported a private

right of action under Section 504.[21] See Whitaker v. Bd. of Higher Educ. of the City of New York, 461 F.Supp., at 108; Hearings on Implementation of Section 504 of the Rehabilitation Act of 1973 before Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977) (testimony of David Tatel, Director of HEW's Office for Civil Rights). As this Court indicated in Cannon, HEW's support of a private right is a relevant consideration in determining that a private right of action is consistent with a legislative scheme. 441 U.S., at 682 n. 8.

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[21] The University cites HEW's comments to its Section 504 regulations, 45 C.F.R. pt. 84, App. A, p. 381, in support of the argument that HEW does not support a private right of action. Petitioner's Brief, at 15. In that section, however, HEW merely indicates that it cannot grant a private right of action on its own initiative and notes that several court decisions have found such a right. It does not indicate any opposition to a private right of action.

In the Title IX context, HEW took the position that a private right would assist the agency in achieving the statutory purpose. 441 U.S., at 706-707. The same is true in this case. See Brief for United States as Amicus Curiae. At least one member of Congress has indicated his belief that a private right of action is necessary to effectively enforce Section 504. See S. Rep. No. 95-820, 95th Cong., 2d Sess. 19 (1978) (remarks of Senator Cranston). In the context of other civil rights statutes, this Court has recognized that suits by persons acting as private attorneys general are an invaluable aid to administrative enforcement. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972); Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968).

As this Court stated in Cannon, "when [a] remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 441 U.S., at 703. It should, therefore, find that a private right of action must be implied under Section 504.

4. This issue is clearly a proper one for the federal courts to decide.

This Court settled the issue of federal court intervention in Cannon when it stated,

> Since the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against such discrimination. Steffel v. Thompson, 415 U.S. 452, 464 (emphasis in original), quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928).

441 U.S., at 708.

Therefore, all the factors of the Cort test are well satisfied by Section 504. To deny a private right of action here

would be to ignore the clear intent of Congress.[22]

B. Exhaustion Should Not Be Required in This Case and the Doctrine of Primary Jurisdiction Should Not Be Applied.

As indicated above, complainants in the administrative process under Section 504 are not allowed to participate in the investigation or subsequent enforcement proceedings. This Court found that that was not an adequate remedy under Title IX.[23]

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[22] Justice Rehnquist's statement in his concurring opinion in Cannon that this Court should be hesitant to imply causes of action in the future, 441 U.S., at 718, does not apply to this case. All the legislative action relevant to this case took place before this Court's decision in Cannon, so that Congress had no opportunity to comply with Justice Rehnquist's suggestion that it specify intent to grant causes of action in the future.

[23] The Court stated:

> For these same reasons, we are not persuaded that individual suits are inappropriate in advance of administrative remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on

[footnote continued]

For the same reason, the Court in Whitaker found that neither exhaustion nor primary jurisdiction should apply. 461 F.Supp., at 108-109. Since Walter Camenisch could not participate meaningfully in the administrative process, it makes no sense to require exhaustion before he seeks redress of his individual grievance in federal court.

Furthermore, the facts of this case were such that Camenisch did not have time to exhaust administrative remedies. It was necessary for him to attend his classes during the summer of 1978 in order to obtain his master's degree so that he could retain his position as acting dean of the school for the deaf. Since the administrative process has no provision for ordering immediate compliance by a recipient, it could in no way be an adequate remedy in this case:

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their complaints within a reasonable time, it makes little sense to require exhaustion. 441 U.S., at 707-708 n. 41.

> [I]t is well settled that administrative remedies need not be sought if they are inherently inadequate or are applied in such a manner as in effect to deny the petitioners their rights.

McCoy v. Greensboro City Bd. of Education, 283 F.2d 667, 670 (4th Cir. 1960). See also Walker v. So. Ry. Co., 385 U.S. 196 (1966); Smith v. Ill. Bell Tel. Co., 270 U.S. 587 (1926); K. Davis, Administrative Law Treatise, §§ 20.01, 20.07 (1958).

The doctrine of primary jurisdiction also is not appropriate in this case. That doctrine is applied in situations where there is no ascertainable standard for a court to enforce and determination of that standard has been delegated to an administrative body assumed to have special expertise in the area. See, e.g., Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975); Texas and Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). The doctrine also is

reserved for situations in which "issues of fact not within the conventional experience of judges [are raised]," or where the statutes call for " . . . the exercise of administration discretion." Far East Conference v. United States, 342 U.S. 570, 574 (1952).

Neither of these situations exists in this case. HEW has made clear the standards to be used in deciding this case by issuing detailed regulations implementing Section 504. The federal courts have extensive experience and have shown requisite expertise to adjudicate civil rights claims such as the one Walter Camenisch is pursuing. Therefore, there is no need and no rationale for allowing HEW to take primary jurisdiction over the case.

III.

SECTION 504 APPLIES TO ALL RECIPIENT INSTITUTIONS WHICH RECEIVE FEDERAL FINANCIAL ASSISTANCE AND TO ALL PARTS WITHIN THOSE INSTITUTIONS.

A holding that the reach of Section 504 goes to all parts of the University of Texas comports most closely with the section's statutory purpose as well as the HEW implementing regulations.

The University would have this Court adopt a definition of "program or activity" which would require that a particular part of the University receive direct federal monies before that part is subject to Section 504 coverage. This would, amici submit, contradict the purpose of Section 504 and would have a far-reaching and devastating impact on the handicapped--the intended beneficiaries of Section 504.

A. A "Unified Entity" or "In Toto" Approach is the Proper Standard for Determining Section 504 Coverage for the University of Texas.

The University of Texas receives over $31 million in federal financial assistance for its educational programs. It nevertheless suggests that unless some of that money can be traced to the classes Walter Camenisch attended, he should not expect Section 504 to protect him from discriminatory conduct otherwise prohibited by that section. This narrow or "pin-point" reading of "program or activity" contravenes the law, whereas an "in toto" definition of Section 504 reflects more clearly the language and intent of Section 504 and the regulations adopted pursuant to that law.[24]

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[24] For a discussion of Section 504 language and legislative history, see section III.B., infra.

The law requires that recipient institutions in toto which benefit from federal financial assistance cannot discriminate against the disabled in any program or activity. 45 C.F.R. § 84.41. While there may be no proof that direct federal financial assistance reaches the classes Walter Camenisch attended, the $31 million that the University of Texas receives has beneficial impact on the entire institution, including those classes. As a federal district court has noted:

> federal aid to any program in a school system releases money for other uses, thereby benefitting those programs that are not direct beneficiaries of the federal aid.

Poole v. South Plainfield Board of Education, 490 F.Supp. 948, 951 (D.N.J. 1980).

Lower courts, including the Poole court, have applied an "in toto" or "unified entity" definition to "program or

activity".[25]

The Court in Poole found that although no federal monies could be traced directly to an interscholastic wrestling program in which plaintiff had been denied participation, Section 504 coverage applied to that specific program, it being:

> absurd to ban discrimination in a discrete area of a school system that receives federal funds while permitting it throughout the rest of the system.

490 F.Supp., at 951.

In Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226 (7th Cir. 1980), the Seventh Circuit rejected a district court's ruling that denied a Section 504 claim on the grounds that

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[25] Although this Court has yet to analyze an in toto standard, in Lau v. Nichols, 414 U.S. 563, 566 (1974), it made no attempt to find or require linkage between federal monies and the specific classes at issue, but rather was content that the "district involved in this litigation receives large amounts of federal financial assistance."

there was no proof that federal monies went directly to the "job category" in question. 629 F.2d, at 1235. The Simpson Court noted that in a matter involving a student beneficiary and recipient educational institution, a "unified entity approach" as applied in Whitaker v. Board of Education of the City of New York, 461 F. Supp. 99 (E.D.N.Y. 1978), and Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.C.D.C. 1976), was appropriate for determining the reach of Section 504 coverage. 629 F.2d, at 1233 n. 12.[26]

In rejecting the "pin-point" approach for determining Section 504 coverage, the Simpson court found;

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[26] As a number of lower courts have noted, legislation like Title VI and Section 504 was passed for the "beneficiaries" of the Acts, not the recipients of federal aid. See Carmi v. Metropolitan St. Louis Sewer Dist. 620 F.2d 672 (8th Cir.) cert. denied, 49 U.S.L.W. 3251 (1980); Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,'" 78 Mich.L.Rev. 608, 620 (1980).

> more persuasive the reasoning of opinions that have rejected this "pin-point" approach to defining what constitutes "[a] program or activity receiving the federal financial assistance." We agree with the result in Simon [v. St. Louis County Police Dept., 14 F.E.P. Cases 1363 (E.D.Mo. 1976)] only insofar as it stands for the principle that private recovery under § 504 is restricted to intended beneficiaries of a federal program but disagree with its suggestion that definition of the program . . . is a matter very narrowly to be determined.

629 F.2d, at 1235.

In Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd., 529 F.2d 514 (4th Cir. 1975), Bob Jones was charged with Title VI violations for racially discriminatory admissions' policy.[27] The court found the necessary federal financial link in the form of

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[27] The relationship between Section 504 and Title VI is discussed, supra, at section II and footnote 15. Title VI has been called the "prototype" of Section 504. Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 88 (4th Cir. 1978). Should there be any doubt about the relationship [footnote continued]

$400,000 the University received and then disbursed to student veterans entitled to federal benefits. There was no other form of federal aid, either going to University programs or to the admissions department. Nonetheless, the court found that the way in which federal financial assistance is transmitted is "irrelevant" and to "argue otherwise would be to suggest that the applicability of Title VI turns on the role of the University as an exchange." Id., at 603.

The Bob Jones court recognized the need for broad interpretations regarding remedial legislation, citing to President Kennedy's message to Congress in 1963, when he said that the then proposed Civil Rights Act was intended to "make it clear that the federal government is not required by any statute to furnish any

between Title VI and Section 504, the passage of the latter made available to handicapped persons the rights, remedies, and procedures of the former. Carmi v. Metropolitan St. Louis Water Dist., 620 F.2d, at 674.

kind of financial assistance" to any institution which discriminates on the basis of race. 396 F.Supp., at 604.

Finally, the University of Texas has failed to provide any authority which supports its overly restrictive interpretation.[28] It asks this Court to give its imprimatur to a definition that is wholly outside the spirit and intent of Section 504.

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[28]The University cites to several lower court cases and, without discussion, implies these decisions have approved a narrow or "pin-point" approach to Section 504. In every one of these cases but two the charging party was an employee and each court found that neither Section 504, Title VI, nor Title IX was intended to protect employees (unless the employee was a participant in an employment project funded by the federal government) but rather participating beneficiaries, for example, students. These cases consequently are without applicability here. The other two cases are equally inappropriate for a consideration of "program or activity." In both Dougherty County School District v. Harris, 622 F.2d 735 (5th Cir. 1980), and Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068 (5th Cir. 1969), the issue was whether HEW could cut off all funds to recipient institutions when only parts were discriminatory. Both courts ruled such broad-based punishment was unwarranted. The issue here is not whether funds should be cut off to all of the University of Texas but simply whether the reach of Section 504 goes to all of the University.

B. Both Regulatory Language and Legislative History of Section 504 Reveals a Clear Intent to Prohibit Discrimination Based on Handicap by Any Recipient Institution, Including All Parts Therein.

Although Section 504 prohibits discrimination in any "program or activity" without elaborating upon the reach of that phrase, regulations passed pursuant to Section 504 and which play a central role in the administration and enforcement of the law, Doe. v. Colautti, 454 F.Supp. 621, 629 (D.C.Pa. 1978), aff'd., 592 F.2d 704 (3rd Cir. 1979), are expansive rather than restrictive. Subpart E of the HEW regulations applies to:

> post-secondary educational programs and activities . . . that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs and activities.

45 C.F.R. § 84.41[29] (emphasis added).

[29] "Recipient" is defined as:
any public or private agency, institution organization, or other entity, or any
[footnote continued]

The language is conjunctive, applying to both programs and activities and the recipient institution in toto.[30]

The legislative history of Section 504 is discussed, supra, in section II.A.2. It should be noted here that Section 504 was enacted:

> to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportation, education, health services or any other Federally aided programs.

S. Rep. No. 1297, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 6373, 6388.

It was Congress' intent to initiate a "comprehensive" rather than a restrictive

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person to which Federal financial assistance is extended directly or through another recipient . . . .

45 C.F.R. §84.3.

[30]This Court has stated, for example, that words of a statute should be interpreted in their ordinary, every day sense, Malat v. Riddell, 383 U.S. 569, 571 (1966).

approach to the elimination of discrimination based on handicap. N.A.A.C.P. v. Wilmington Center, Inc., 453 F.Supp. 280, 298 (D.C. Del. 1978).

Finally, Section 504, like Title VI, is "remedial" legislation. Poole v. South Plainfield, 490 F.Supp., at 950. This Court has approved "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purpose." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); cf. Brennan v. Keyser, 507 F.2d 472 (9th Cir. 1974), cert. denied, Keyser v. Dunlop, 420 U.S. 1004 (1975) (any exceptions to remedial legislation must be narrowly drawn).

In conclusion, should this Court accept the University's definition of "program or activity" it would be forced to reject what it has called an "obligation to honor the clear meaning of a statute,

as revealed by its language, purpose, and history." International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel, 439 U.S. 551, 566 n. 20 (1979).

Adoption of the University's restrictive definition of "program or activity" would contravene the meaning and purpose of Section 504 as discussed, supra. It would encourage recipient institutions like the University of Texas to channel federal monies to programs where there are no handicapped persons and thereby avoid any compliance cost of Section 504. It would force upon the beneficiaries of this legislation the responsibility of finding those parts of the University that receive federal aid in order to ensure Section 504 protection.

Perhaps more importantly, it would sanction existing, or create new discriminatory pockets where protective legisla-

tion would have no reach within the University of Texas and other recipient institutions. It would suggest an absurd analysis of a university's structure for determination of coverage. The French or History departments might be subject to Section 504 coverage while Spanish and Biology might not. Further, within specific departments, only those courses of study or even classes within courses of study, which receive federal aid, might be accessible to the disabled. A handicapped student might face the real possibility of being unable to complete academic work for a degree, if he or she were restricted to only those departments, courses of study or even classes which receive direct federal financial assistance. In such cases the purpose of Section 504 would be effectively defeated, while creating an enforcement nightmare.

The importance of defining "program or

activity" cannot be overstated. If it must be shown that a class or program receives direct federal financial assistance, a university need only be responsive to its own priorities and its own sense of right and wrong in making the rest of its program accessible. Sadly, Walter Camenisch and other handicapped persons have not as yet been able to rely on the largesse of many institutions.

Amici believe that if the University asked this Court to adopt its approach with respect to Title VI (thereby establishing the University's right to prohibit minority students from those classes that do not receive direct aid), this Court would justifiably reject such reasoning, as it should here. It is for all these reasons that this Court, in the remedial spirit of Section 504, should find that Section 504 applies to all parts of the University of Texas.

CONCLUSION

Section 504 was intended to break down the barriers to the disabled. In particular, it was intended to open the institutions of higher learning that have always represented the most significant opportunity for individual growth and advancement. The University of Texas, in denying its legal responsibility to make reasonable accommodations to Walter Camenisch, would have this Court abandon the clear mandate of Section 504 and in effect reconstruct those barriers.

This Court has an opportunity to ensure that Section 504 continues to be meaningful protection for the millions of deaf and other handicapped people as well as a symbol of this Country's commitment to finally bring them into the mainstream of society. In the remedial spirit of Section 504, this Court must affirm the decision below by holding that the

University of Texas is required by Section 504 to make the accommodation sought by Walter Camenisch.

Dated: January 27, 1981

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No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE
TO FILE BRIEF AND

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (EEAC) moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioners, the University of Texas, *et al.*, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and in-

dustry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. In addition, most of EEAC's members are federal contractors subject to Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, which unlike Section 504, requires affirmative action "to employ and advance in employment qualified handicapped individuals." Despite the significant differences in Sections 504 and 503, the Court's resolution of the jurisdictional and substantive issues in this case will influence the resolution of similar issues under Section 503.

3. Accordingly, EEAC's members have a direct interest in the issues presented for the Court's consideration, including: (1) whether private individuals may bring suit under Section 504 without first showing that they are participants in programs in which they were the intended beneficiaries of federal financial assistance and that they have exhausted administrative remedies; and (2) whether Section 504 requires institutions and employers receiving financial assistance to take positive steps to accommodate otherwise qualified handicapped persons.

4. Because of its interest in issues involving the private right of action under our civil rights laws, EEAC filed a brief as Amicus Curiae in this Court in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361 (1979); and *Cannon* v. *University of Chicago*, 99 Sup. Ct. 1946 (1979). On numerous other occasions, EEAC has filed briefs as amicus curiae. *See, e.g., International*

Brotherhood of Teamsters v *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Great American Federal Savings & Loan Association* v. *Novotny*, 99 Sup. Ct. 2345 (1979).

5. The written consent of counsel for the petitioners to the filing of this brief has been filed with the Clerk of the Court. Counsel for the respondent indicated that he would not consent, thereby necessitating this motion.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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---

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICUS CURIAE [1]

The Council is a voluntary nonprofit association composed of employers and trade associations. Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, EEAC's members have a direct interest in the issues presented for the Court's consideration; that is, (1) whether private in-

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[1] The interest of the amicus curiae Equal Employment Advisory Council is set forth in greater detail above in the motion for leave to file a brief as amicus curiae.

dividuals may bring suit under Section 504 without showing that they are participants in programs in which they were the intended beneficiaries of financial assistance and that they have exhausted administrative remedies; and (2) whether Section 504 requires institutions and employers receiving financial assistance to take positive steps to accommodate otherwise qualified handicapped persons.

SUMMARY OF ARGUMENT

The legislative history of the Rehabilitation Act of 1973 and its two amendments shows that Congress did not intend to create a right of action under Section 504 for private individuals against recipients of federal financial assistance prior to an administrative determination. In order for an otherwise qualified handicapped individual to have standing under Section 504 to seek review of an agency determination, the complainant must have been the intended beneficiary in a program receiving federal funds and have exhausted his administrative remedies. Because resolution of handicap discrimination complaints are substantially more complex than those involving race, sex, or national origin, exercise of administrative expertise by the funding agency is a necessary predicate to judicial review.

Section 504, which merely proclaims a policy of nondiscrimination, does not require recipients to undertake costly accommodations for the handicapped. *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361, 2369 (1979). Because there is no "accommodation" language in the statute in question, no such accommodations are required and even if such an obligation exists, Section 504 requires that recipients incur no more than *de minimis* costs to comply. To require more would be at odds with this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

ARGUMENT

I. SECTION 504 DOES NOT CREATE AN ADDITIONAL PRIVATE RIGHT OF ACTION BEYOND THE RIGHT TO SEEK JUDICIAL REVIEW OF AN ADVERSE AGENCY ACTION.

A. The Legislative History of the Rehabilitation Act of 1973 and Its Two Amendments Does Not Support an Implication of a Right of Action Under Section 504 for Private Individuals Against Recipients of Federal Funds Prior to an Administrative Determination.

The question of whether a statute creates a cause of action, expressly or by implication, is essentially a matter of statutory construction. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 100 Sup. Ct. 242, 245 (1979); *Touche Ross & Co.* v. *Redington*, 99 Sup. Ct. 2479, 2485 (1979); and *Cannon* v. *University of Chicago*, 99 Supp. Ct. 1946, 1953 (1979). "[T]he fact that a federal statute may have been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross*, 99 Supp. Ct. at 2485; and *Cannon*, 99 Sup. Ct. at 1953. Rather, as recognized in recent decisions of this Court, the central inquiry in such cases is whether it is clear that Congress intended to create the private remedy asserted.[2] *Transamerica*, 100 Sup. Ct. at 245; and *Touche Ross*, 99 Sup. Ct. at 2489. *Cf. Cannon*, 99 Sup. Ct. at 1975 (Powell, J., dissenting) ("Absent the most compelling evidence of af-

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[2] In *Cannon*, the Court implied a private right of action under Title IX of the Education Amendments of 1972, relying on the four factor test in *Cort* v. *Ash*, 422 U.S. 66 (1975). Since that decision, this Court has adopted a stricter standard in deciding questions of private rights of action and has determined that the four *Cort* factors standing alone do not justify the implication of a private right of action. *Transamerica*, 100 Sup. Ct. at 249 ("The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative our inquiry is at an end."); and *Touche Ross*, 99 Sup. Ct. at 2489.

firmative congressional intent, a federal court should not infer a private course of action.")

Section 504 as enacted in 1973 does not explicitly create a right for anyone to bring suit in federal court. Moreover, the only contemporaneous legislative history is one sentence which refers to the provision as a mere policy proclamation.[3] This characterization is not surprising because the Rehabilitation Act of 1973 was not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped individuals—especially the severely handicapped—and developing new programs to assist in their assimilation into society. It was enacted primarily to improve the states' delivery of vocational rehabilitation services to handicapped individuals.

In sum, Section 504 stood alone within the Rehabilitation Act of 1973 unaccompanied by any implementation provisions. No authority was delegated to any agency to promulgate or enforce regulations under the Act. These omissions are in contrast with the language of Section 503 of the Rehabilitation Act, which contained provisions mandating the promulgation of regulations and the establishment of a complaint procedure within the Department of Labor. 29 U.S.C. § 793. Thus, no private right of action can be inferred under Section 504 because no rights to administrative process or other action was evidenced by the statute.

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[3] S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123, stated: "The bill further incudes a provision proclaiming a *policy* of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." (Emphasis added.) *See Snowden* v. *Birmingham-Jefferson County Transit Authority*, 407 F.Supp. 394, 397 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977).

1. *The 1974 Amendments.*

Notwithstanding this contemporaneous legislative history indicating that Section 504 was no more than a policy statement, numerous courts between 1973 and 1978 concluded that Section 504 authorizes a private right of action. All of the courts of appeals that reached this conclusion, including the court below, have based their decisions on the *Cort* analysis of the Seventh Circuit in *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977).[4]

In *Lloyd*, the court relied heavily on the legislative history of the 1974 amendments to the Rehabilitation Act, which amended the definition the "handicapped individual" but did not in any way modify Section 504. Although the Act was amended for this limited purpose, the report written to support overriding the presidential veto of the 1974 amendments included language which extended beyond the scope of the amendments and attempted to clarify Congress' intent in 1973 regarding Section 504. Specifically, the Senate Committee report stated that: (1) Section 504 was patterned after the nondiscrimination language pertaining to recipients of federal financial assistance in Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI), and

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[4] *See N.A.A.C.P.* v. *Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978); *United Handicapped Federation* v. *Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); and *Leary* v. *Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977). Significantly, in *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 1229 (7th Cir. 1980), the Seventh Circuit stated that the assumption by other courts that it implied a private right of action under Section 504 in *Lloyd* "may reflect an oversimplified view of that case and ignores the limitations we there expressed." The court in *Lloyd* found a private right of action solely on the basis that at the time of its decision there did not exist remedial administrative procedures under Section 504. See pp. 7-8, *infra*.

Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681 (Title IX); (2) although not specifically required by Section 504, regulations were to be promulgated; and (3) the enforcement provisions of Section 504 were to be patterned after the implementing regulations of Title VI, 45 C.F.R. Parts 80 and 81, and Title IX, 45 C.F.R. Part 86. S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974).

In contrast to the weight accorded to this legislative history in *Lloyd* by the Seventh Circuit, this Court in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361 (1979), stated that this committee report, "made after the enactment of the statute under consideration [Section 504], cannot substitute for a clear expression of legislative intent at the time of enactment (citations omitted)." 99 Sup. Ct. at 2370 n.11. Moreover, "[n]or do these comments, none of which represents the will of Congress as a whole, constitute subsequent 'legislation' such as this court might weigh in construing the meaning of the earlier enactment." *Id.* Consequently, the legislative history attached to the 1974 amendments does not justify reading Section 504 as anything more than it appears on its face to be, *i.e.*, an expression of a nondiscrimination policy with respect to the allocation of the benefits of federal funding to the handicapped.

Indeed, a comparison of the language of Section 504 as enacted in 1973 with Title VI and Title IX shows that the only similarity between these statutes is limited to the language prohibiting discrimination. In both of those titles, Congress followed the prohibition of discrimination by recipients of financial assistance with a detailed section directing all federal agencies and departments which disburse federal money to issue regulations. 42 U.S.C. § 2000d-1; and 20 U.S.C. § 1682. Section 504 contains no such direction. Furthermore, unlike Section 504, Titles VI and IX both provide for presidential review of the regulations and compliance with

them by termination of federal funds or by other means authorized by law. *Id.* Finally, those titles provide for judicial review of agency action against recipients by any aggrieved person pursuant to the procedures of the Administrative Procedures Act. 42 U.S.C. § 2000d-2, and 20 U.S.C. § 1683. Again, Section 504 contains no such provision.

Even if Congressional intent could be gleaned from the 1974 committee report, it at most shows that Congress intended the enforcement provision of Section 504 to be patterned after existing Title VI and Title IX regulations, which neither provide for nor contemplate a private cause of action. There is no indication in the report that Congress assumed that Title VI created a private remedy or evidence in the legislative history that any Member of Congress voted in favor of either the 1973 statute or the 1974 amendments in reliance of an understanding that Title VI provided a private remedy.[5]

Furthermore, a conclusion that there is a private right of action under Sections 504 is not justified by the following sentence in the 1974 Senate report:

> This approach to implementation of section 504, which closely follows the models of Title VI and Title IX, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. S. Rep. No. 93-1297 at 39-40.

The *Lloyd* court—the only court to construe this sentence—stated that this phrase "contemplates judicial re-

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[5] This Court has never explicitly held that Title VI contemplates a private right of action and Amicus believes there is none for reasons well-stated in Justice White's dissenting opinion in *Cannon*, 99 Sup. Ct. at 1968-1974 (White, J. and Blackmun, J., dissenting); and separate opinion in *University of California Regents* v. *Bakke*, 438 U.S. 265, 379 (1978) (separate opinion of White, J.).

view of an administrative proceeding as contradistinct from an independent cause of action in federal court. . . ." 548 F.2d at 1286. The entire passage from the Senate report can be considered nothing more than a directive to HEW and other administrative agencies to enforce Section 504 as HEW was already enforcing Title VI and Title IX. If HEW, for example, should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be HEW, not the recipient of federal funds, and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole. *See Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

Nor can the Seventh Circuit's statement in *Lloyd* that, in the circumstances prevailing at the time of that decision, "there can be no objection to an independent cause of action in the federal courts," 548 F.2d at 1286, fairly be read to support such a private cause of action today. For the court specifically noted, in reaching that conclusion, that at the time of its decision there did not exist administrative remedial machinery under Section 504. Significantly, however, the Seventh Circuit "expressly reserved the question of whether a private right of action would still be available after final regulations were promulgated." *Simpson*, 629 F.2d at 1230. *See Lloyd*, 548 F.2d at 1286 n.29.

Although not explicitly authorized by Section 504 until the passage of the 1978 amendments to the Rehabilitation Act (discussed below), at least 11 federal agencies including HEW have issued virtually identical Section 504 regulations. Consequently, as a result of Executive

Order 11914 (41 Fed. Reg. 17871), which authorized HEW to coordinate the implementation of Section 504 by all federal departments and agencies, there now exists a uniform regulatory framework for Section 504.[6] There now being a consolidated enforcement program under Section 504, "the judicial remedy available must be limited to post-administrative remedy judicial review." *Lloyd*, 548 F.2d at 1286 n.29.

2. *The 1978 Amendments.*

The legislative history of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978[7] likewise confirms that alleged discriminatees may not enter federal court except to seek review of adverse administrative action pursuant to the Administrative Procedure Act. As with the original Act in 1973, the principal thrust of the 1978 amendments was to expand vocational rehabilitation, research, training, and construction programs and, additionally, to create a permanent authorization of appropriations for the basic federal-state vocational rehabilitation program. 29 U.S.C. § 701. Unlike in 1974, some of the amendments affected Section 504.

Section 504 was amended to authorize agency heads to promulgate agency regulations. In this respect, Section 504 now parallels Section 503, as enacted in 1973, because both now require implementing regulations and administrative enforcement.[8] Congress also added a

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[6] On November 2, 1980, HEW's coordination function was transferred to the Department of Justice by Executive Order 12250, 45 Fed. Reg. 72995 (November 4, 1980), which is now authorized to coordinate the implementation and enforcement of Title VI, Title IX, Section 504, and any other law which precludes discrimination in programs receiving federal financial assistance.

[7] P.L. 95-602, 92 Stat. 2955, 2982, 2984.

[8] Because Section 503 as enacted contained an administrative enforcement scheme, courts have viewed this express remedy as a

new Section 505, which explicitly grants a private right of action to alleged victims of handicap discrimination in federal employment under Title VII of the Civil Rights Act of 1964, but then rejects that approach for Section 504 complainants by specifying that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964" apply to Section 504 violations. 92 Stat. 2982. By doing so, Congress was merely codifying the HEW regulation, 45 C.F.R. § 84.61, which made available to Section 504 complainants the "remedies, procedures and rights" of Title VI—which, again, do not provide for or contemplate a private cause of action for alleged victims of discrimination directly against alleged violators.[9] That Section 505 authorizes discretionary awards of attorney's fees to the prevailing party, other than the United States "in any action or proceeding to enforce or charge a violation of" Section 504, does not indicate that Congress intended a private right of action. Rather, this provision applies to ad-

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strong indication that Congress did not intend to provide a private judicial remedy as well under Section 503. *See, e.g., Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. 200, 203 (N.D. Texas 1977), *aff'd*, 611 F.2d 1074 (5th Cir. 1980); *Anderson* v. *Erie Lackawanna Ry. Co.*, 468 F.Supp. 934, 938-39 (N.D. Ohio 1979); and *Wood* v. *Diamond State Telephone Co.*, 440 F.Supp. 1003, 1009 (D. Del. 1977).

[9] "Obviously, when Congress wished to provide a private . . . remedy [under the Rehabilitation Act], it knew how to do so and did so expressly." *Touche Ross*, 99 Sup. Ct. at 2487. In view of the express judicial remedy provided in Section 501 and the express administrative remedy provided in Section 504, "it is highly improbable that Congress absentmindedly forgot to mention an intended private action" for Section 504. *Transamerica*, 100 Sup. Ct. at 247, *citing Cannon*, 99 Sup. Ct. at 1981 (Powell, J., dissenting).

This Court has refused to infer private rights of actions where administrative or like remedies are expressly available. *See, e.g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453 (1974). *See also Transamerica Mortgage Advisors*, 100 Sup. Ct. at 247 ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

ministrative proceedings pursuant to the incorporated Title VI regulations, together with the limited judicial review authorized by Title VI itself, 42 U.S.C. § 2000d-2. Like the portion of the legislative history of the 1974 amendments which was construed by the Seventh Circuit in *Lloyd*, these provisions of the 1978 amendments contemplate "judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286.[10]

Nothing in the legislative history of the 1978 amendments indicates otherwise. The floor statements of Senators Cranston,[11] Stafford,[12] and Bayh,[13] the committee reports,[14] and the conference reports[15] indicate no more than the amendments to Title V of the Rehabilitation Act contemplate a right to seek judicial review of administrative action.[16] Significantly, Senator Cranston

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[10] *See Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) ("[I]t does not necessarily follow that the [attorney's fees] amendment is intended to authorize private individuals to file civil actions"); *Cf. Simpson* v. *Reynolds Metals Co.*, 629 F.2d at 1243 ("We are left without any indication that, contemporaneous with its adoption of § 503, Congress intended to extend a private remedy").

[11] 124 Cong. Rec. S15590-91, 15593 (daily ed. September 20, 1978); and *Id.* at S19001 (daily ed. October 14, 1978).

[12] 124 Cong. Rec. S18999-S19000 (daily ed. October 14, 1980).

[13] 124 Cong. Rec. S15593 (daily ed. September 20, 1980). In all of the court cases relied on by Senator Bayh, none explicitly held that a private right of action was available under Title VI, and 42 U.S.C. § 1983 provided an alternative and express cause of action in those cases.

[14] S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

[15] H. Rep. No. 95-1780, Conf. Rep., 95th Cong., 2d Sess. (1978) *as reported in* 124 Cong. Rec. H 12720 (daily ed. October 12, 1978).

[16] To the extent that the remarks of the three Senators seem to indicate that the 1978 Attorney's fees provision reflects Congress' original intent that Section 504 included a private right of action, this Court placed little weight on such subsequent legislative history

clearly distinguished the provisions of the amendments applicable to Section 504 from those applicable to Section 501, which explicitly extended Title VII rights, remedies and exhaustion requirements to qualified federal employees who are victims of handicap discrimination.[17] Moreover, the House Conference Report, which accepted the Senate's proposals concerning attorney's fees and the applicability of Title VI rights, remedies and procedures to Section 504, also unequivocally differentiated between the private right of action available to federal employees and the procedures available to aggrieved handicapped under Section 504.[18] Given the proximity of Section 501 to Section 504, the conclusion is inescapable—Congress obviously knew how to create an independent judicial remedy for persons covered by Section 504, but failed to do so, just as it has so often in the past rejected similar proposals in the form of amendments to Title VII. See Appendix A. *See Rogers* v. *Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977).

In sum, there is no evidence whatsoever in Section 504's history of a Congressional intent to provide for the type of private suit for injunctive relief which the court of appeals permitted in this case. Congress intended to foreclose private litigation about alleged handicap discrimination by recipients of federal financial assistance until a final agency determination has been made. Con-

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relating to the effect of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, on a similar right under Title IX. *Cannon*, 99 Sup. Ct. at 1952 n.7. *See also Southeastern Community College*, 99 Sup. Ct. at 2370 n.11. See p. 6, *supra*. It is significant to note, moreover, that, unlike Title IX, Section 504 did not contain a provision for the award of attorney's fees contemporaneous with passage of the Act. *See Cannon*, 99 Sup. Ct. at 1958-59 & n.25.

[17] *Compare* 124 Cong. Rec. S15591 *with* S15593 (daily ed. September 20, 1978).

[18] 124 Cong. Rec. H12720 (daily ed. October 12, 1978).

gress is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers" [19] contained in Title VI and incorporated by reference into Section 504. This Court has never demanded that Congress insert into a statute or its legislative history a sentence to the effecvt that "no court shall imply any additional remedies hereunder" as a precondition to its refusal to "expand the coverage of the statute to subsume other remedies." [20]

B. Implication of a Private Right of Action Under Section 504 Would Interfere With the Legislative Purpose of the Rehabilitation Act.

It is important to view Section 504 within "the context of the entire legislative scheme" [21] of the Rehabilitation Act of 1973, as amended. As previously noted, as enacted in 1973, the Rehabilitation Act was nothing more than a massive appropriations bill designed to improve the delivery of vocational rehabilitation services. In contrast, to the legislative histories associated with Title VI and IX, there were no legislative findings regarding discrimination with respect to the handicapped. Although not specifically required by the Act, an administrative enforcement mechanism was established, which was codified by the 1978 amendments. Thus, in 1978 the primary jurisdiction over enforcement of Section 504 was committed, not to the courts, but to federal agencies which Congress presumed had developed the expertise to prevent discrimination against qualified handicapped persons.

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[19] *See Brown* v. *GSA*, 425 U.S. 820, 883 (1976).

[20] *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[21] *Morris* v. *Gressetle*, 432 U.S. 491, 501 (1977), *citing Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).

Clearly, the legislative purpose of Section 504 is better served by agency enforcement, and judicial review of agency action, than by private suits. Unlike race, color, national origin, or sex discrimination, which are addressed in Title VI and Title IX, "handicapped discrimination" is not susceptible to precise categorization. It is different in kind and does not necessarily have the same effect on equal opportunity as with other forms of discrimination. Former HEW Secretary Matthews explained the unique definitional problems in a letter accompanying the publication of the initial proposed Section 504 regulations of HEW:

> Section 504, however, differs conceptually from both titles VI of the Civil Rights Act of 1964 and IX of the Education Amendments of 1972. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required. 41 Fed. Reg. at 20296 (1976).

Thus, determinations of handicapped discrimination involve the resolution of two significant threshold issues not present in resolving discrimination complaints under Title VI and Title IX: (1) the determination of who meets

the statutory definition of a "handicapped individual," [22] and (2) the determination of when equal treatment violates the statute. Because the answers to these questions are novel and complex, judicial implication of a private right to sue under Section 504 would defeat the legislative purpose that before federal courts become involved, the administrative agencies should be given an opportunity to apply their expertise to these issues in the context of remedying handicapped discrimination in programs for which they provide financial assistance. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-68 (1947). This is no simple task.

While there may be no difficulty in determining if a person is a "handicapped individual" under the Act if their impairment involves, for example, blindness or a mobility handicap, less disabling impairments present problems in terms of whether the statutory definition of "handicapped individual" is met. For example, administrators and judges have been struggling for years with definitions of disability in cases arising under the Social Security Act.[23] The extreme difficulty in determining who is disabled, and to what extent, are illustrated by the conflicting medical testimony in a myriad of cases involving disability benefits, personal injuries, and workmen's compensation. *See, e.g.*, *LeMaster* v. *Weinberger*, 533 F.2d 337 (6th Cir. 1976) (conflicting testimony as to whether claimant had or was disabled by multiple sclerosis); *see also*, Liebman, *The Definition of Disability in Social Security and Supple-*

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[22] The definition of "handicapped individual" found in Section 706(7) of the Act is set forth in Appendix B.

[23] Only those persons who cannot perform any job anywhere in the National economy are disabled for purposes of the Social Security Act. 42 U.S.C. § 423(d)(2)(A). The disabling physical or mental impairment must be medically demonstrable. 42 U.S.C. § 423(d)(3).

mental Security Income: Drawing the Bounds of Social Welfare Estates, 89 Harv. L. Rev. 833 (1976).

Likewise, the problems involving application of the statute to "handicapped individuals" are equally difficult, requiring an administrative assessment before judicial review. Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. Nor is there a class of non-handicapped persons with whom treatment of handicapped persons can be compared. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 706(7), is so broad that allegations of discrimination could not be restricted to readily identifiable classes of persons but undoubtedly would encourage complaints based upon disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

Although Congress chose to use the same term "discrimination"—as is found in Title VI and Title IX, Congress showed its caution by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap. Furthermore, Congress has consistently rejected attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground of discrimination. See Appendix A. Significantly, by incorporating the procedures and remedies of Title VI, with their explicit exclusion of employment practices from coverage except for federally subsidized jobs programs, Congress has shown in particular that it did not want employment discrimination lawsuits to arise under Section 504.[24] In

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[24] *See Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 99 Sup. Ct. 2895 (1979); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 673, 674-

addition, the courts have been particularly adverse to implication of private judicial remedies in matters involving employment practices under federal statutes and executive orders.[25] Judicially created employment litigation under the Rehabilitation Act would present, in the words of the court in *Lloyd*, "the unseemly vista of a spotty application of ad hoc remedies in lawsuits in various regions of the country." 548 F.2d at 1286. In view of the cautious approach of Congress in this new area, and because Congress chose to establish an administrative scheme for handling these claims, rather than to provide for private causes of action, this Court should not create a direct judicial forum for resolving these complicated problems.[26]

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75 (8th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3231 (U.S. 1980); *Simpson*, 629 F.2d 1226, 1234-35 (7th Cir. 1980); *Brinkley* v. *Department of Public Safety*, 22 FEP Cases 164, 165-66 (N.D. Ga. 1980); and *Proffit* v. *Consolidation Coal Co.*, 21 FEP Cases 382 (S.D. W.Va. 1979). *Contra*, *Hart* v. *County of Almeda*, 21 FEP Cases 233 (N.D. Calif. 1979).

[25] *See, e.g.*, the cases collected in *Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. at 202 n.1.

[26] Although the question of whether Section 504 contains a private right of action was argued by the petitioner and respondent in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. at 2366 n.5, the Court declined to rule on the question because of its disposition of the case on the merits. Consequently, the fact that this Court two years earlier vacated the judgment and remanded a Section 504 case to the district court in *Campbell* v. *Kruse*, 434 U.S. 808 (1977) "to decide the claim based on" Section 504 does not "acknowledge the judicial authority to entertain private suits for injunctive relief under Section 504" as held by the Court below. (Pet. App. A-7, footnote omitted.)

II. ANY IMPLIED JUDICIAL REMEDY UNDER SECTION 504 SHOULD BE CAREFULLY CIRCUMSCRIBED.

A. Section 504 Applies Only to Programs Receiving Federal Financial Assistance, and Not to Other Activities Administered by the Recipient.

Pursuant to the 1978 amendments to the Rehabilitation Act, only the remedies, procedures, and rights under Title VI are available to complainants under Section 504. The legislative history of Title VI clearly demonstrates that it was program specific; that is, Title VI's provisions applied only to the program receiving the financial assistance. *See* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 50-54, 65-67 (1976).

As the 1964 Civil Rights Act worked its way through the House and Senate, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in another. The Administration's cabinet-level representatives consistent answer was that it could not.[27] A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program.

The Senate floor leader for Title VII emphasized that "[p]articipation in one program would not justify the

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[27] *See, e.g., Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. 1543 (1963) (colloquy between Representative Meader and HEW Secretary Celebreeze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. 2766 (1963) (Attorney General Kennedy indicated that the termination of assistance be limited to the particular *program* and *location* where the discrimination exists).

exaction of a non-discrimination assurance concerning some other program." [28] Similarly, Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[29] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the so-called "pin-point" termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced." [30] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs.[31] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the Senate amendments to the Bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law." [32]

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[28] 110 Cong. Rec. 7059 (1964) (remarks of Senator Pastore).

[29] *Id.* at 7067 (remarks of Senator Ribicoff).

[30] *Id.* at 12689 (remarks of Senator Saltonstall).

[31] *Id.* at 12714-15 (remarks of Senator Humphrey).

[32] *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 6 (1964).

This view of legislative history of Title VI has been affirmed by the courts. In *Bd. of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit held that programs could not be condemned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *Accord, Gatreaux* v. *Romney*, 457 F.2d 124, 128 (7th Cir. 1972) (federal assistance to model cities program unrelated to housing cannot be terminated because of discrimination in a low-rent housing program).

The legislative history and the decisions of the courts makes clear, therefore, what is evident from the statutory language—federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". As a corollary, a remedy for the aggrieved is not available unless it is proven that the complainant participated in a program which received federal financial assistance and was the intended beneficiary of that assistance. *Carmi*, 620 F.2d at 674-75 & n.4. These Title VI standards apply to Section 504 by virtue of the 1978 amendments to the Rehabilitation Act. *Id.*, and *Simpson*, 629 F.2. at 1234. Consequently, to have standing under Section 504, the plaintiff must plead and prove as a jurisdictional prerequisite that the particular activity he participated in received federal financial assistance and that he was the intended beneficiary of that assistance. *Id.*[33] In the instant matter, the stipulated

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[33] The program specific nature of rights and remedies under Section 504 is most clearly shown with respect to employment. Section 604 of Title VI, which is incorporated by reference into Section 504, explicitly excludes employment practices of recipients except in federally-subsidized jobs programs. 42 U.S.C. § 2000d-3 (1970). *See United States* v. *Jefferson County Bd. of Educ.*, 372

facts show only that the defendant university was a recipient of federal assistance but do not specify that the plaintiff participated in a program receiving such assistance.

B. The Complainant Must Exhaust Available Administrative Remedies With the Department of Health, Education, and Welfare Before Filing Suit in Federal Court.

It is well-established that a suit may not be brought under Title VI—the statute which determines the rights and remedies under Section 504—without exhausting administrative remedies under 42 U.S.C. § 2000d-2. *See Green Street Association* v. *Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).[34] The Title VI exhaustion requirement applies both to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School District of City of Saginaw, Michigan* v. *HEW*, 431 F. Supp. 147 (E.D. Mich. 1977). Under Section 504, exhaustion has been required before seeking court review. *See Neal* v. *U.S. Postal Service*, 468 F.Supp. 958 (D. Utah 1979); *Doe* v. *New York University*, 442 F.Supp. 522, 523 (S.D.N.Y.

F.2d 836, 882-83 (5th Cir. 1966), *decree corrected on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, 389 U.S. 840 (1967). Moreover, the three courts of appeals which have examined the relationship between the rights and remedies under Section 504 and Title VI have concluded that an action to redress employment discrimination may not be maintained unless a primary objective of the federal financial assistance is to provide employment. *See Trageser*, 590 F.2d at 89; *Carmi*, 620 F.2d at 674-75; and *Simpson*, 629 F.2d at 1227.

[34] *See also Cave* v. *Beame*, 433 F.Supp. 172, 174 (E.D.N.Y. 1977); *Johnson* v. *County of Chester*, 413 F.Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green* v. *Cauthen*, 379 F.Supp. 361, 378 (D.S.C. 1974); *Feliciano* v. *Romney*, 363 F.Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree* v. *City of Chattanooga*, 362 F.Supp. 1136, 1141-42 (E.D. Tenn. 1973).

1978); and *Davis* v. *Bucher*, 451 F.Supp. 791 (E.D. Pa. 1978). *But see Whitaker* v. *Board of Higher Education of New York*, 18 FEP Cases 906 (E.D.N.Y. 1978); and *Hart* v. *County of Alameda*, 21 FEP Cases 233 (N.D. Calif. 1979).

Furthermore, the complainant must fully exhaust administrative remedies. It is not sufficient, as here, that a complaint has been filed with HEW. As this Court held in *Aircraft & Diesel Equipment Corp.*, 331 U.S. at 767-68 (1974):

> The doctrine of exhaustion of administrative remedies, whereever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.
>
> The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended

to and could commit to such agencies for final decision. (Footnote omitted [35])

Moreover, courts should be, and have been, reluctant to find relatively new administrative machinery insufficient before it has had a chance to prove its adequacy. *See Doe* v. *New York University*, 442 F.Supp. at 523, and *Rogers* v. *Frito-Lay*, 433 F.Supp. at 203.[36]

The need for agency investigation and determination is compelling in the field of handicap discrimination under Section 504 of the Rehabilitation Act. As former HEW Secretary Matthews stressed, handicap discrimination is "far more complex" than the discrimination prohibited by Title VI and Title IX.[37] As an agency which has had substantial experience administering programs for the rehabilitation of handicapped individuals, HEW is better equipped than the federal courts to make the initial investigation of complex factual situations and to formulate a consistent approach to handicap dis-

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[35] These policies were further explained and summarized in *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McGee* v. *United States*, 402 U.S. 479, 484-85 (1971), and *McKart* v. *United States*, 395 U.S. 185 (1969).

[36] In view of Congress' desire that Section 503 and 504 be administered in a uniform and consistent manner, the fact that HEW's administrative procedures do not allow the complainant to participate in the investigation or subsequent enforcement proceedings should not be determinative of the exhaustion question as it was in *Cannon* (99 Sup. Ct. at 1961-62 n.41). *See* S. Rep. No. 93-1297 at 39-40; and 120 Cong. Rec. 30551 (1974) (remarks of Senator Stafford). There being no statutory preclusion to the complainant's participation in the administrative process, the administrative procedures adopted by HEW should not undercut the clear Congressional intent that there be a right to a hearing, a right to review and exhaustion of the administrative process before a limited right action can be initiated. See p. 7, *supra*. *Cf. Mohasco Corporation* v. *Silver*, 100 Sup. Ct. 2486, 2496 (1980) (Administrative interpretation or regulation "cannot supersede the language chosen by Congress.")

[37] 41 Fed. Reg. at 20296; *see* p. 14, *supra*.

crimination problems. Thus, exhaustion of administrative remedies should be required under Section 504 as well, with judicial review limited to such questions as whether HEW exceeded its statutory authority or abused its discretion.[38]

III. SECTION 504 IS A NONDISCRIMINATION STATUTE AND DOES NOT IMPOSE ANY OBLIGATION TO UNDERTAKE POSITIVE STEPS TO ACCOMMODATE "OTHERWISE QUALIFIED HANDICAPPED" INDIVIDUALS.

Section 504 merely requires that recipients of federal financial assistance not discriminate against otherwise qualified handicapped individuals solely on the basis of their handicap. By its terms Section 504 does not contain any requirement to accommodate the needs of an "otherwise qualified handicapped individual." *See Carmi* v. *St. Louis Sewer District*, 20 FEP Cases 162, 164 (E.D. Mo. 1979). Indeed, to be "otherwise qualified" implies the absence of need for any accommodation. Congress' use of this terminology shows that it intended only to

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[38] Alternatively, the complainant should be required to pursue his claims with HEW pursuant to the doctrine of primary jurisdiction. *See Crawford* v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C. 1977). Under the doctrine, whether the agency is an expert or not, a court normally should not act upon subject matter that is peculiarly within the agency's specialized field, without considering the results of the administrative process for otherwise parties who are subject to the agencies continuous regulation may become the victims of uncoordinated and conflicting requirements. *See* Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964); and *Federal Maritime Board* v. *Ibrandtsen*, 356 U.S. 481, 498-99 (1958). "Court jurisdiction is not thereby ousted, but only postponed." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). This doctrine has been applied to Section 504 claims by at least one district court in *Crawford* and is particularly appropriate to the complex area of handicap discrimination. *Cf. Drennon* v. *Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Pa. 1977) (Doctrine of primary jurisdiction applies to Section 503).

eliminate practices that exclude handicapped persons who are fully capable of participating in a program without accommodation. HEW, however, has promulgated a regulation under Section 504 which purports to impose such a requirement on recipients with respect to their employment practices, 45 C.F.R. § 84.12, and a number of other regulations, *e.g.*, 45 C.F.R. § 84.22 (modification of existing facilities), § 84.23 (new construction), and § 84.44 (d) (auxiliary aids), which will require, according to HEW's own estimate, an expenditure of at least $3.2 *billion* annually on behalf of handicapped individuals by institutions which participate in federally-funded programs.[39] Such expenditures would require recipients of federal financial assistance to provide services, including interpreter services, which Congress designated to be provided by state agencies under the Act. 29 U.S.C. §§ 720(a), 723(6). Private entities such as the University herein receive no funds to provide such services. Instead of placing the burden on recipients, the Act as amended in 1978 specifies that "[comprehensive rehabilitation] centers shall provide . . . [to entities such as the University] such technical assistance (including support personnel such as interpreters for the deaf) as may be necessary . . . in complying with . . . the requirements of section [504]. . . ." 29 U.S.C. § 775. Thus, on the basis of a one-sentence statute prohibiting "discrimination," HEW has mandated extremely expensive preferential treatment that is inconsistent with the allocation of responsibilities under the Rehabilitation Act.

None of these regulations requiring accommodation including those for auxiliary aide is authorized by the

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[39] *See* O'Neill, Discrimination Against Handicapped Persons—The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (May 4, 1977) (unpublished report prepared for the HEW Office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77), p. 55.

statute. To the extent that such "accommodation" would cause a recipient to incur more than a negligible expense, the requirement is preferential rather than nondiscriminatory. HEW's regulations thus not only exceed the statute's mandate; they violate it. These regulations unlawfully attempt to bootstrap a failure to make preferential accommodations into discrimination—whereas, in the absence of a finding of illegal discrimination, there cannot possibly arise any statutory duty to implement preferential remedies.[40]

Recognizing the problems associated with HEW's interpretation of a recipient's obligations under Section 504, this Court in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361, 2369-70 (1979), found that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." (Footnote omitted.) Specifically, with regard to HEW's accommodation regulations, the Court stated:

> If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute unauthorized extension of the obligations imposed by the statute. 99 Supp. Ct. at 2369.

Moreover, the Court distinguished the requirements of Sections 503 and 504:

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons [Section 504] and af-

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[40] *Cf. Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 577-78 (1977) ("Title VII forbids the employer from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.").

> firmative efforts to overcome the disabilities caused by handicaps [Section 503]. *Id.*
>
> * * * *
>
> A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it when it wished to do so. *Id.* (footnote omitted.)

Noting that the line between affirmative action and discrimination may not always be clear, the Court went on to say that sorting out the instances involving one or the other will "be an important responsibility of HEW." *Id.* at 2370. Because HEW has ignored this responsibility and has not modified its accommodation regulations since this Court's decision in *Southeastern Community College*, those regulations now are entitled to even less deference for they clearly are in conflict with the guidance established by the Court. The clear meaning of Section 504 is to prohibit discrimination and not to mandate accommodation. Section 504 contains no language which would require the estimated $3.2 billion annual expenditure which HEW seeks to impose on recipients.

This Court previously construed a requirement of reasonable accommodation for religious practices imposed by the 1972 amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). Even in that context, where (unlike the situation under Section 504) Congress clearly placed a reasonable accommodation burden on employers, this Court held that an employer need not incur more than a *de minimis* cost to accommodate the employee's religious practice. Anything beyond that would be unreasonable, or, differently stated, would constitute an undue hardship on the employer.[41]

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[41] *See also Upshur* v. *Love*, 20 FEP Cases 638, 645 (N.D. Calif. 1976) (Hiring an aide to assist blind teacher to perform adminis-

In *Hardison*, this Court questioned whether, prior to the 1972 amendments, the EEOC had authority to issue a "reasonable accommodation" regulation at all under Title VII's mere prohibition of discrimination on the basis of religion. 432 U.S. at 76 n.11 (1977). Thus, insofar as HEW's regulations purport to require such accommodations or expenditures or other "affirmative conduct," they exceed HEW's authority and cannot be relied upon to support the decision below.

The Rehabilitation Act of 1973, as amended, is not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped—especially severely handicapped—individuals and developing new programs to assist in their integration into society. There is no indication in the text or legislative history of the Rehabilitation Act or its two amendments that anyone other than the federal government must bear the expense for these subsidies and programs. It is inconceivable that by including the one-sentence policy statement of Section 504, Congress intended *sub silentio* to impose on recipients of federal financial assistance (not ear-marked to pay accommodation costs) a multi-billion dollar burden [42] to restructure American educational and industrial facilities and practices to accommodate "otherwise qualified handicapped individuals." It likewise stretches credulity to believe that Congress also intended for all who fit within the definition of 29 U.S.C. § 706(7) to be able to use the federal courts to force recipients to make and bear the expense of such accommodations.

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trative duties exceeds nondiscrimination requirements of Section 504).

[42] *See* p. 25 & n.39, *supra*.

CONCLUSION

The decision of the court of appeals should be reversed and this Court's opinion should make it clear that Section 504 (1) does not give rise to a private right of action, (2) requires an otherwise qualified handicapped person to be an intended beneficiary of federal financial asistance and to have exhausted administrative remedies to have standing, and (3) does not impose an obligation to take positive steps to accommodate otherwise qualified handicapped individuals.

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December 18, 1980

APPENDIX A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964 to Add Handicap as a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	*Sponsor*
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	*Sponsor*
S. 1311	Pell
S. 1757	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4624	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1977-78)

Bill	*Sponsor*
S. 1477	Weicker
H.R. 264	Conte
H.R. 461	Le Fante
H.R. 1107	O'Brien
H.R. 1200	Rodino
H.R. 1995	Roybal
H.R. 3504	Edwards
H.R. 6619	Beard
H.R. 9477	O'Brien & 2 others
H.R. 9521	O'Brien & 15 others
H.R. 10198	O'Brien & 6 others

96th Congress (1979-80)

Bill	*Sponsor*
H.R. 373	Guyer
H.R. 609	O'Brien
S. 446	Harrison & 24 others

APPENDIX B

Definition of Handicapped Individual

(7) (A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of [Sections 503 and 504], any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. For purposes of Sections [503] and [504] of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706(7), *as amended* by the Rehabilitation Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619, and *as amended* by the Rehabilitation, Comprehensive Services and Disabilities Amendments of 1978, Pub. L. 95-602, § 122(a), 92 Stat. 2984.

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No. 80-317

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Petitioners,

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WALTER CAMENISCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., *AMICUS CURIAE,* IN SUPPORT OF RESPONDENT

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MOTION OF THE LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Legal Action Center of the City of New York, Inc., respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Although the attorney for the respondent Walter Camenisch has consented to the filing of a brief amicus curiae,* counsel for petitioners has refused consent.

* Consent of counsel for respondent is being lodged with the Clerk of the Court.

The Legal Action Center is a public interest law firm founded in 1973. A large portion of its program is dedicated to fair employment issues, particularly those related to the employment of former substance abusers, a group protected by section 504 of the Rehabilitation Act. The Legal Action Center has engaged in litigation and administrative proceedings arising under the Rehabilitation Act and is therefore familiar with the issues raised in the instant case and with the effect a reversal of the decision below would have upon the protections afforded by the Act to handicapped individuals. Those protections are in the process of being defined and developed in the lower courts. The Legal Action Center has limited its brief as amicus curiae to the two issues presented to this Court which would affect a handicapped individual's right to sue because, in its judgment, reversal of the decision below on either of these grounds would severely hamper fair employment efforts on behalf of all handicapped groups. Moreover, the Center believes that this case can be resolved on a narrower ground than that presented by the parties to this Court, namely that the factual record in this case is inadequate to decide an important question of law.

To assist the Court's resolution of a case which could affect the ways in which handicapped individuals

can enforce the important protections afforded them under the Rehabilitation Act, we submit this brief amicus curiae.

Respectfully submitted,

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Dated: January 28, 1981

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BRIEF OF THE LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., AMICUS CURIAE, IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae appears in the foregoing motion.

STATEMENT OF THE CASE

Respondent Walter Camenisch, a deaf graduate student at the University of Texas at Austin (petitioners), is a "qualified handicapped individual" as

that term is defined in section 504 of the Rehabilitation Act of 1973 and regulations issued by the Department of Health, Education and Welfare (now the Department of Health and Human Services) (Stipulation of Facts, ¶ ¶ 1, 7, 8, Petitioners' Appendix at A-30). Respondent Camenisch's continued employment as Dean of Students at the East Campus of the Texas School for the Deaf was contingent upon his completion of a Master's Degree. While respondent Camenisch was otherwise qualified to complete a Master's Degree at the University of Texas at Austin, in order to participate in and complete that program he needed the services of a sign language interpreter (Stipulation of Facts ¶9, Petitioners' Appendix at A-31).

The University of Texas at Austin received a substantial portion of its budget from the federal government at the time respondent was enrolled in its graduate program (Stipulation of Facts ¶ ¶ 17, 18, Exhibit 5. Petitioners' Appendix at A-32, A-41-43). Petitioners signed an Assurance of Compliance agreement with HEW which bound the University to "comply with section 504 of the Rehabilitation Act, . . . all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto . . . in consideration of and for the purpose of obtaining any and all federal grants, . . . or other federal financial assistance" (Stipulation of Facts ¶17, Exhibit 5, Petitioners' Appendix at A-32, A-41-43).

Regulations promulgated by HEW require recipients of federal financial assistance, such as petitioners, to provide otherwise qualified handicapped individuals, such as respondent, with the services of a sign language interpreter (45 C.F.R. Part 84). Despite this, and despite a finding by HEW that their refusal to do so was a violation of section 504, petitioners refused to provide respondent Camenisch with the services he needed in order to complete their Master's program.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973 confers a private right of action upon "otherwise qualified handicapped individuals" who by reason of their handicap are "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination under any program or activity receiving Federal financial assistance." Congress patterned the language of section 504 on the language of Title VI of the Civil Rights Act of 1964, which it knew had been held to create a private right of action. Congress reaffirmed its original intent to create a private remedy for victims of discrimination prohibited by section 504 in amending the Rehabilitation Act in 1974 and 1978 (Point I.A).

A private right of action is consistent with the underlying purposes of section 504. Private remedies

under section 504 complement the administrative enforcement mechanisms established by executive agencies, since those mechanisms do not provide for individual participation in administrative proceedings or for individual relief from discrimination (Point I.B). Finally, implying a federal remedy is clearly appropriate in this civil rights area, as the Justice Department (the agency charged with government-wide coordination of section 504 enforcement) and seven courts of appeals have found (Point I.C).

This Court should reject petitioners' belated attempt to raise the question whether the relief granted was appropriate in this case in the absence of a finding that the federal funds the University of Texas at Austin received were directly related to the "program or activity" in which respondent sought to participate.

First, it is clear from the legislative history surrounding passage of the Rehabilitation Act, and from regulations promulgated by the relevant executive agencies, that petitioners' restricted reading of the term "program or activity" is in error (Point II.A). Second, because petitioners never raised the issue below, the record developed in this case is insufficient for this Court to determine whether a narrow reading of the term "program or activity" under section 504 is in order (Point II.B).

ARGUMENT

I

AS CONGRESS INTENDED AND THE COURT OF APPEALS CORRECTLY HELD, SECTION 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE RIGHT OF ACTION ON QUALIFIED HANDICAPPED INDIVIDUALS WHO ARE VICTIMS OF DISCRIMINATION.

Section 504 of the Rehabilitation Act of 1973[1/] mandates that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. §794.

As in the case of other civil rights statutes enacted in the decade preceding Congress' enactment of this civil rights law,[2/] section 504 of the Rehabilitation Act does not explicitly confer a private right of action

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1/ Pub. L. 93-112 (September 26, 1973), 87 Stat. 357, codified in 29 U.S.C. §701 et seq.

2/ E.g., Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d ("Title VI"); section 901 of Title IX of the Education Amendments of 1972, 29 U.S.C. §1681 ("Title IX").

on individuals injured by discriminatory practices in violation of it. But this Court "has long recognized that under certain limited circumstances the failure of Congress to [expressly specify a private right of action in a statute] is not inconsistent with an intent on its part to have such a remedy available to persons benefited by its legislation." Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 1967-8 (1979). Like Title IX of the Education Amendments of 1972, which was found by the Court in Cannon to have created a private remedy, section 504 of the Rehabilitation Act "presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied [private] remedy are present." Id., 99 S.Ct. at 1968.

The factors to be considered in determining whether the circumstances favoring implication of a private remedy are present in this case were originally outlined by this Court in Cort v. Ash:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action

> one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

422 U.S. 66, 78 (1975) (citations omitted). Cannon and subsequent decisions of this Court emphasize that the "central inquiry" in cases such as the one at bar is "whether Congress intended to create, either expressly or by implication, a private cause of action," Touche Ross & Co. v. Redington, ___ U.S. ___, 99 S.Ct. 2479, 2489 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, ___ U.S. ___, 100 S.Ct. 242 (1979). And they make it clear that the "first three factors discussed in Cort — the language and focus of the statute, its legislative history, and its purpose . . . are ones traditionally relied upon in determining legislative intent," id.

A. The First and Second Cort v. Ash Factors: Congress Clearly Intended to Create a Private Right of Action for "Qualified Handicapped Individuals."

The plain language of section 504, the legislative history of the Rehabilitation Act as originally enacted, and as amended by Congress in 1974 and 1978, and the clearly remedial and protective purposes of its nondiscrimination mandate all manifest an intent on the part of Congress to create a private right of action.

The threshold question under Cort is whether section 504 was enacted for the benefit of a special class of which plaintiff is a member. That question "is answered by looking to the language of the statute itself," Cannon v. University of Chicago, supra, 99 S.Ct. at 1953.

Section 504 unquestionably identifies the particular class of persons — qualified handicapped individuals — for whose especial benefit the statute was enacted. It does so in language typical of civil rights statutes which declare the rights of discrete groups of individuals to be free from invidious discrimination. Cf. Cannon, 99 S.Ct. at 1954 n. 13. Its language is virtually identical to the nondiscrimination mandates contained in Title IX of the Education Amendments of 1972[3/] and Title VI of the Civil Rights Act of 1964[4/] — language which this Court

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3/ Section 901 of Title IX of the Education Amendments of 1972, 29 U.S.C. §1681, provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

4/ Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides:

(footnote continued next page)

found dispositive in determining that a private right of action exists under Title IX, Cannon, 99 S.Ct. at 1953-55. Indeed, as discussed infra at 10, the nondiscrimination mandate of section 504 was consciously patterned after those two civil rights laws. In Cannon, this Court gave particular weight to the fact that Congress, when it patterned Title IX after the nondiscrimination provision of Title VI, knew that Title VI had consistently been construed as creating a private remedy. Id., 99 S.Ct. at 1956-58. Since section 504 is patterned after both Title VI and Title IX, what was said in Cannon applies with equal force here:

> it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents [implying private rights of action under Title VI and similarly phrased statutes]. . . and that it expected its enactment to be interpreted in conformity with them.

Id., 99 S.Ct. at 1958.

It is not, however, necessary to rely upon a presumption that Congress knew what it was doing when it patterned section 504 after the language in Title VI and

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> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title IX. For the legislative history of the 1974 and 1978 amendments to the Rehabilitation Act makes explicit this reliance on prior court rulings, and clarifies beyond dispute that Congress' original intent was that section 504 provide a private remedy for persons injured by its violation.

The comments of the Senate Labor and Public Welfare Committee on the 1974 amendments to the Rehabilitation Act[5/] are illustrative:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1972. . . .
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach to implementation of section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

S. Rep. No. 93-1297, 93rd Cong., 2d Sess., reprinted in

5/ The Rehabilitation Act Amendments of 1974, Pub. L. 93-516 (December 7, 1974), 88 Stat. 1619, expanded the definition of "handicapped individual" for purposes of Titles IV and V (including section 504) of the Act, see 29 U.S.C. §706(7), and made other clarifying changes.

[1974] U.S. Code Cong. & Ad. News, 6371, 6390-91 (emphasis added).

Any possible remaining question on the issue is laid to rest by the 1978 amendments which added section 505 to the Act.[6/] Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. §794a(a)(2). Since Title VI remedies have been consistently construed by courts and were understood by Congress to include a private right of action, Cannon, 99 S.Ct. at 1957; see also Regents of the University of California v. Bakke, 438 U.S. 265 (1978), this statutory language makes explicit Congress' intent to create a private right of action.

Moreover, the 1978 amendments also added a provision parallel to the Civil Rights Attorney's Fees

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6/ The Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, §120, Pub. L. 95-602 (Nov. 6, 1978), 92 Stat. 2982.

Awards Act of 1976, 42 U.S.C. §1988.[7/] Section 505(b) provides that:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. §794a(b). This provision clearly presumes the existence and availability of a private right of action to enforce section 504. Cf. Cannon, 99 S.Ct. at 1951 n.6, 1952 n.7. The legislative history underlying this attorneys' fee provision supports this reading. The Senate report on section 505(b) states:

> The committee believes that the rights extended to handicapped individuals under Title V, that is, Federal government employment, physical accessibility in public buildings, employment under federal contracts, and nondiscrimination under federal grants — are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

7/ Petitioners' argument that the failure of the Civil Rights Attorney's Fees Awards Act to mention section 504 suggests that Congress intended no private right of action under that statute obviously loses all force in light of Congress' subsequent enactment of section 505(b) of the Rehabilitation Act.

S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978) (emphasis supplied).[8/]

[8/] The floor debates on this provision are also illuminating. Thus Senator Cranston, who authored the attorneys' fee provision, noted that:

> Priavte [sic] enforcement of these Title V [including section 504] rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. As noted in the report to accompany S. 2278, the Civil Rights Attorneys' Fee Awards Act of 1976 (S. Rept. 94-1011):
>
> > [A]ll . . . civil rights law[s] depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate Congressional policies which these laws combat.

124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978). See also 124 Cong. Rec. S18999-19000 (daily ed. Oct. 14, 1978) (remarks of Sen. Stafford); 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978) (Senators Bayh and Cranston expressing "the continuing intention of Congress that private actions be allowed under titles VI and VII of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 and title V of the Rehabilitation Act of 1973").

In sum, the language and legislative history of section 504 and related provisions of the Rehabilitation Act demonstrate beyond cavil an original and progressively more explicit Congressional intent that victims of discrimination forbidden by section 504 be given both the right and, through the attorneys' fee provision, a meaningful opportunity to vindicate privately the purposes of section 504.[9/]

9/ The fact that Congress provided the best illumination of its intent respecting the existence of a private right of action under section 504, not at the time of its original enactment, but in the legislative history of the 1974 and 1978 amendments to the Rehabilitation Act, in no way lessens the clarity of that intent. It is well established that the post-amendment treatment of a statute by Congress is cogent evidence of the intent of Congress at the time of its passage, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). This Court made clear in Cannon that, although post-enactment interpretations by Congress of its original intent in enacting the civil rights statute at issue there could not be accorded the weight of contemporary legislative history,

> we would be remiss if we ignored those authoritative expressions concerning the scope and purpose of Title IX and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.

Cannon, supra, 99 S.Ct. at 1952 n.7.

B. The Third Cort v. Ash Factor: A Private Right Of Action is Consistent With the Underlying Purposes of Section 504.

For precisely the reasons that led this Court in Cannon to find a private remedy to be compatible with the underlying legislative scheme of Title IX, the answer to the third Cort inquiry in this case is clear: far from frustrating them, a private remedy will affirmatively aid the accomplishment of Congress' dual purposes in enacting section 504.

As with Title IX, the language and legislative history of section 504 reveal that Congress sought to accomplish two purposes through its enactment: to avoid the use of federal resources to support the discriminatory practices forbidden by section 504, and to provide individuals an effective remedy against those practices. As with Title IX, the first purpose is well served by the administrative enforcement procedures established under section 504 for termination of federal financial assistance to entities engaged in discriminatory practices outlawed by section 504. But the administrative enforcement mechanism under section 504 is identical to that used to enforce Title IX; [10/] it suffers from the

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10/ The regulations HEW adopted to implement section 504 incorporate the Title VI enforcement procedures, see 45 C.F.R. §84.61 (1979) (HEW regulations

(footnote continued next page)

same deficiencies that led this Court to find a private remedy complementary to and not destructive of the administrative enforcement mechanism under that statute.

As this Court noted in Cannon, 99 S.Ct. at 1961-62, the remedy of terminating federal financial assistance — the only sanction available under the administrative enforcement scheme — is a draconian and at the same time ineffective means of remedying individual instances

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implementing section 504 among recipients of HEW funds) and 45 C.F.R. §85.5 (1979) (HEW regulations implementing Executive Order 11914); those are the same administrative procedures used to enforce Title IX, 45 C.F.R. §86.71 (1979). Executive Order 11914, 41 Fed. Reg. 17871 (April 28, 1976), reprinted in 29 U.S.C.A. §794 app. (Supp. 1980), required HEW to promulgate guidelines for the government-wide enforcement of section 504. The regulations HEW issued pursuant to that Order, 45 C.F.R. §85.5 (1979), mandated all federal agencies to adopt Title VI enforcement procedures in establishing their respective mechanisms for enforcing section 504. In the course of amending the Rehabilitation Act in 1978, Congress subsequently endorsed HEW's adoption of the Title VI procedures for purposes of implementing section 504, see S. Rep. No. 95-890, 95th Cong., 2d Sess. 18 (1978) (explaining amendment adding section 505(a)(2) to the Act, discussed infra at p. 11). The Department of Justice duly incorporated the Title VI procedures in its own regulations implementing section 504, 28 C.F.R. §42.530, 45 Fed.Reg. 37626 (Dec. 3, 1980); it has now been given responsibility for coordinating government-wide enforcement of section 504 — as well as Title VI and Title IX — under Executive Order 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980).

of discrimination. An agency found to have discriminated will be cut off from funding, but the individual victim of discrimination will benefit not at all. Indeed, the individual complainant is not even granted a role in the agency investigation and enforcement proceedings. A private remedy which focuses on the aggrieved individual and permits a court to provide individually tailored relief is therefore a far more appropriate and effective remedy, as the circumstances of the case at bar make absolutely clear.

The United States Department of Justice, the agency which is now responsible for coordinating all federal administrative efforts to enforce section 504,[11/] endorses private rights of action under section 504:

> The Department has adopted the Title VI complaint and enforcement procedures for use in implementing section 504. . . .
>
> As to remedies, section 120(a) of the Rehabilitation Act Amendments of 1978 authorizes the payment of attorneys' fees to the prevailing party "in any action or proceeding to enforce or charge a violation of this title" (Title V). Accordingly, it is clear that there is a private right of action under section 504. "The availability of attorneys' fees should assist in vindicating private rights of action . . . arising under section 504." Sen. Rep. No. 95-890, 95th Cong., 2d Sess. (1978). Cf., Cannon v. University of Chicago, 441 U.S. 677 (1979).

11/ See n. 10, supra.

28 C.F.R. Part 42, App. B, 45 Fed. Reg. 37631-2 (June 3, 1980). In fact, far from viewing private lawsuits as a threat to the consistent enforcement of section 504, the Department of Justice does not require exhaustion of its administrative remedies before such suits are filed:

> Nothing in this subpart requires the referral of a complaint against a recipient to the Department for action as a legal prerequisite for filing a lawsuit against the recipient.

Id. As this Court has said many times, the judgment of the agency charged with enforcement of this statute is entitled to respect:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' " Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396 [1961].

Udall v. Tallman, 380 U.S. 1, 16 (1965); EPA v. National Crushed Stone Association, 49 U.S.L.W. 4008, 4013 (Dec. 2, 1980).

Unquestionably, then, recognition of both private and public enforcement mechanisms will enhance the realization of Congress' objectives in enacting section 504.

C. The Fourth Cort v. Ash Factor: Implying a Federal Remedy is Clearly Appropriate.

Finally, there can be no question after Cannon that the fourth inquiry under Cort mandates recognition of a private right of action with respect to section 504. As in Cannon, this case involves a civil rights statute prohibiting invidious discrimination by those who are recipients of federal funds. As to all such statutes, Cannon provides the definitive answer to the last Cort inquiry:

> Fourth, the final inquiry suggested by Cort is whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. No such problem is raised by a prohibition against invidious discrimination of any sort, including that on the basis of sex. Since the Civil War, the Federal Government and the federal courts have been the "'primary and powerful reliances'" in protecting citizens against such discrimination. Steffel v. Thompson, 415 U.S. 452, 464, 94 S.Ct. 1209, 1218, 39 L.Ed.2d 505 (emphasis in original), quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928). Moreover, it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the Cort analysis supports the implication of a private federal remedy.

Cannon, supra, 99 S.Ct. at 1963.

* * *

In sum, implication of a private right of action is clearly appropriate in this case. Indeed, the courts of appeals for all seven circuits which have reached this issue to date have recognized Congress' clear intent to create a private remedy for victims of discriminatory practices forbidden by section 504, and have respected that intent by finding a private right of action to be implicit in section 504. Kling v. Los Angeles County (9th Cir., Dec. 8, 1980), 49 U.S.L.W. 2414 (Dec. 23, 1980); Carmi v. Metropolitan St. Lewis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 101 S.Ct. 249 (1980); Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258 (3rd Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1281 (7th Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413, 415 (8th Cir. 1977). [12/]

12/ Even those courts of appeals which have narrowly defined handicapped individuals' standing to bring actions challenging employment discrimination in violation of

(footnote continued next page)

II

SINCE THE UNIVERSITY OF TEXAS AT AUSTIN WAS THE "PROGRAM OR ACTIVITY" THAT DISCRIMINATED AGAINST RESPONDENT, THE COURT OF APPEALS CORRECTLY GRANTED RESPONDENT RELIEF.

Petitioners stipulated below that federal financial assistance provided a substantial portion of the operating budget of the University at the time it denied respondent Camenisch the assistance he sought. Petitioners also stipulated that respondent Camenisch was a "qualified handicapped individual" who "need[ed] the services of a qualified interpreter in order to effectively participate in the educational program operated by [the University]" (Stipulation of Facts, ¶ ¶ 8, 10, Petitioners' Appendix at A-30, 31).

For the first time, in this Court, petitioners seek to raise the question whether the federal funds received

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section 504, as discussed infra at n. 18, have not doubted the existence of a private right of action generally under section 504, see Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980) cert. denied, 101 S.Ct. 249 (1980); Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

by the University were directly related to the program in which respondent sought to participate. Petitioners argue that, in the absence of evidence of a direct relationship between the federal financial assistance the University received and its act of discrimination against respondent Camenisch, the courts below should have denied respondent relief. Petitioners' argument should be rejected for two reasons.

First, petitioners' argument is based upon an incorrect reading of the phrase "program or activity" as used in section 504. Petitioners' reading is contrary to the purposes behind section 504 and to the controlling regulations promulgated by the Department of Justice -- the agency now responsible for coordinating government-wide enforcement of section 504 — and by the Department of Health, Education and Welfare — the agency which provided the University of Texas at Austin with federal financial assistance.

Second, because petitioners never raised this issue below, this Court has no factual background upon which to decide whether, in this case, should it reject the definition of "program or activity" mandated by executive department regulations, respondent was "subjected to discrimination under any program or activity receiving federal financial assistance."

A. The Operations of Petitioner University of Texas at Austin as a Whole Constitute a "Program or Activity" Receiving Federal Financial Assistance.

The broad nondiscrimination mandate and legislative history of section 504 of the Rehabilitation Act, as well as authoritative interpretations by the federal agencies with responsibility for coordinating enforcement of section 504 among recipients of federal financial assistance, make clear that the proper definition of "program or activity" reaches the University of Texas at Austin as a whole.

In enacting its ban against handicap-based discrimination "under any program or activity receiving Federal financial assistance" in section 504, Congress did not explicitly define the term "program or activity." Nonetheless Congressional intent to reach and redress discrimination against qualified handicapped individuals in all activities receiving or benefitting from federal funds is clearly demonstrated by the broad remedial purposes of the Rehabilitation Act[13/] and by the interrelated package of affirmative action and nondiscrimination mandates that is contained in Title V of the Act,

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13/ Congress' declaration of purpose when the Rehabilitation Act was originally enacted in 1973 spelled out in detail its goals of expanding services to the handicapped, of promoting vocational rehabilitation efforts

(footnote continued next page)

including section 504.[14/] The legislative history of the Act and its subsequent amendments also displays a clear Congressional intent to address discrimination under any

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by, inter alia, training vocational rehabilitation personnel, and of expanding employment opportunities to the handicapped in both public and private sectors, Pub. L. 93-112, §2, 87 Stat. 357, reprinted in 29 U.S.C.A. §701. In the 1978 Amendments to the Act, Congress made its declaration of policy more concise, see H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 41, reprinted in [1978] U.S. Code Cong. & Ad. News 7375, 7412-13, and expressed a comprehensive goal of guaranteeing equal opportunity to the handicapped not merely in employment (as the original provision had suggested) but generally:

> The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living. 29 U.S.C. §701.

[14/] In addition to section 504, whose nondiscrimination mandate bars discrimination in federal agencies as well as among all recipients of federal financial assistance in the provision of benefits, services and employment, section 501 requires federal government agencies to take affirmative action to employ and promote the handicapped, 29 U.S.C. §791, and section 503 requires federal contractors and subcontractors to do the same, 29 U.S.C. §793.

and all federal grants, and nowhere suggests that Congress intended the narrow reading of "program or activity" petitioners would impose.[15/]

Consistent with this Congressional intent, the United States Department of Health, Education and Welfare and the Department of Justice — the agencies charged with coordinating government-wide implementation and enforcement of Section 504 since its enactment in 1973 — have issued regulations on section 504 which make it clear that the operations of the University of Texas at Austin as a whole, not merely those parts of it that received dollars directly from the massive infusion of federal aid to that institution, constitute the "program or activity" which violated section 504 by denying respondent the interpreter funds he sought.

The Department of Justice regulations are explicit on this issue:

15/ See e.g., S. Rep. No. 93-318, 93d Cong. lst Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2076, 2078, 2091, 2123, 2143; S.Rep. No. 93-1297, 2d Sess. 38-39, reprinted in [1974] U.S. Code Cong. & Ad. News 6371, 6389 (explaining that Congress had broadened the definition of "handicapped individual" for purposes of Title V of the Act because the narrowness of its prior definition had failed to protect, among others, children denied admission to "Federally-supported school systems" and persons who had completed vocational rehabilitation but were still discriminated against in "Federally-assisted activities").

> The term "program" means the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., a police department or department of corrections.

28 C.F.R. §42.540(h), 45 Fed. Reg. 37626 (June 3, 1980) (emphasis added). Under this definition, all the operations of an institution which receives federal funding are clearly subject to the nondiscrimination mandate of section 504.

The HEW regulations, relevant here because it is HEW which supplied funding to the University,[16/] support this broad reading of "program or activity." Thus, while the HEW regulations do not define "program or activity," the definition of "recipients" of federal financial assistance who are subject to section 504 is instructive:

> (f) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

16/ The HEW regulations are also relevant because HEW was originally designated as the agency responsible for coordinating the enforcement of section 504 by all federal agencies. See n. 10, infra.

45 C.F.R. §84.3(f) (1979); 45 C.F.R. §85.3(d) (1979).[17/] The HEW regulations that specifically govern post-secondary educational institutions such as the University of Texas at Austin are to the same effect. The regulations prohibiting discriminatory practices by such institutions in violation of section 504 are made applicable to:

> postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

17/ See also HEW's general definition of prohibited discriminatory practices under section 504:

> A recipient, in providing any aid, benefit or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped individual the opportunity to participate in the aid, benefit or service; . . .
>
> (v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipients' program.

45 C.F.R. §84.4(b)(1)(i), (v) (1979); 45 C.F.R. §85.51(b)(1)(i), (v) (1979) (emphasis added).

45 C.F.R. §84.41 (1979) (emphasis added). See also 45 C.F.R. §§ 84.42-84.47 (1979).

These authoritative administrative interpretations of the scope of the phrase "program or activity" and the reach of section 504 compel the conclusion that the court below was correct in granting respondent relief on the strength of petitioner's stipulation that it received a substantial amount of federal financial assistance. See also NAACP v. Medical Center, supra, 599 F.2d at 1248 n. 4 (3rd Cir. 1979); Kampmeier v. Nyquist, supra, 553 F.2d at 298 n. 2 (2d Cir. 1977); Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979); Whitaker v. Board of Higher Education of the City of New York, 461 F.Supp. 99 (E.D.N.Y. 1978); Crawford v. University of N. Carolina, 440 F.Supp. 1047 (M.D. N.C. 1977); Barnes v. Converse College, 436 F.Supp. 635 (D.C.S.C. 1977); Sites v. McKenzie, 423 F.Supp. 1190 (N.D. W.Va. 1976).[18/]

18/ Petitioners' argument to the contrary is based upon decisions, cited infra at n. 12, which concern the scope of section 504 in cases involving, not the services sought by respondent here, but discrimination in employment by recipients of federal funds. That discrete issue, about which there is considerable dispute, see e.g., Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979), 28 C.F.R. Part 42, App. B(B) (Analysis of Justice Department regulations on section 504), 45 Fed. Reg. 37628 (June 3, 1980), is simply irrelevant in the circumstances of this case.

(footnote continued next page)

Petitioners have not offered any sound reason to overturn these executive and judicial interpretations of the scope of section 504. Indeed, petitioners' narrow reading would severely emasculate the protections offered by section 504. It would permit, for example, a recalcitrant recipient of federal financial assistance to escape civil rights scrutiny — not only by the courts but also by the executive agency funding sources — by allocating federal support to discrete operations. Such a

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Petitioners' reliance on misplaced analogies to Title VI of the Civil Rights Act and Title IX of the Educational Amendments of 1972 in support of their mean definition of what "programs" are subject to the nondiscrimination mandate of section 504 is equally off the point, as there are substantive differences in the coverage of those laws and section 504 of the Rehabilitation Act. The "program-specificity" requirements of Title VI, see, e.g., Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) stems from and is directly based on the statutory "pinpoint" requirement of section 602 of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1, which has no analogue in the nondiscrimination provisions of Title V of the Rehabilitation Act. The Title IX cases cited by petitioner (Petitioner's Brief at 18) all concern the question whether that law's prohibition against sex discrimination in educational institutions extends to protect employees of such institutions. That issue, about which there is disagreement, see, e.g., North Haven Board of Education v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), has no bearing on the case at bar, since Congress' intentions regarding the coverage of employees of federal fund recipients differ under section 504 and Title IX.

reading would make the coverage of section 504 contingent upon creative bookkeeping practices which would undermine the effectiveness the Congress clearly meant it to have.

B. Any Restricted Reading of the Phrase "Program or Activity" Should Not Be Made on The Scanty Factual Record Developed in this Case.

Beyond the bare stipulation that petitioner University receives substantial federal support, no facts were developed by the parties and courts below about how the federal funds received by the University were budgeted among its divisions, departments, courses, or functions. In part this is because petitioners did not raise the "program or activity" issue in the courts below. As a consequence, this Court has no factual record upon which to determine the proper definition of the term "program or activity" should it decide to reject the definition promulgated by the executive agencies responsible for section 504 enforcement.

A fully developed factual record is essential to such an inquiry. First, respondent Camenisch claims in this Court that he will be able to show that the University of Texas Graduate School of Education, in which he was enrolled, received funds under a federal aid program designed to pay the costs of training "personnel

engaged or preparing to engage in employment as teachers of handicapped children [or] as supervisors of such teachers. . . ." (20 U.S.C. §1431). If respondent Camenisch makes such a showing, no further inquiry need be made since there would be a clear, direct connection between the federal financial assistance received by the University of Texas and its act of discrimination against respondent.

Moreover, between the clear answer provided by such a showing by respondent and the clear mandates of the federal regulations, there are innumerable possible rulings this Court could make on the scope of the phrase "program or activity." It is because of the complexity of the issue and the wide-ranging effect a ruling by this Court would have that a fully developed factual record is essential. Therefore, should this Court decide to reject the federal agencies' and lower courts' interpretation of the scope of section 504, this case should be remanded for further proceedings relevant to this issue.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, et. al.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR AMICI CURIAE
MICHIGAN REHABILITATION ASSOCIATION
AMERICAN REHABILITATION AND DEAFNESS ASSOCIATION
ILLINOIS REHABILITATION ASSOCIATION
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No. 80-317

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, et. al.,

Petitioners,

v.

WALTER CAMENISCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 36.3 of this Court, the Michigan Rehabilitation Association, the American Deafness and Rehabilitation Association, the Illinois Rehabilitation Association, and the National Center for Law and the Handicapped respectfully move for leave to file a Brief *Amici Curiae* in support of Respondent, urging that the judgment of the United States Court of Appeals below be affirmed. *Amici*, whose interest in the case is set forth in the Brief tendered herewith, address the issues of Respondent's asserted right of action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and of the effect of this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), on the lower court's order that Petitioners provide sign language interpreter services to Respondent. They believe that their experience as advocates on behalf of handicapped people, and as professionals serving hearing impaired persons, will aid the Court

in its disposition of this novel case by presenting arguments reflecting their knowledge both of Section 504 and auxiliary aids in postsecondary institutions. Respondent has consented to the filing of the Brief; Petitioners have not responded to four telephone requests from undersigned counsel seeking consent.

Respectfully submitted,

Kent Hull
National Center for Law and the Handicapped, Inc.

P.O. Box 477
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Attorney for *Amici Curiae*

INTEREST OF AMICI CURIAE

This Brief *Amici Curiae* is filed by professional and public interest organizations concerned about the civil rights of handicapped individuals. The Michigan Rehabilitation Association (MRA) is an organization of counselors, administrators, and other professionals working in rehabilitation. MRA files this brief on behalf of the professional rehabilitation community in the United States and seeks to assist the Court by presenting a position on the issues which reflects MRA's experience with rehabilitation services for deaf and hearing impaired persons. The American Deafness and Rehabilitation Association (ADARA) and the Illinois Rehabilitation Association (IRA) join as *co-Amici* to support this position. ADARA is a professional organization consisting of counselors, interpreters, social workers, administrators, teachers, and parents concerned with the development of quality programs for deaf individuals. It conducts continuing education programs for professionals working with deaf individuals, and through its publications and other activities, offers a forum to promote a better understanding of the unique rehabilitation needs of

deaf persons. IRA, like MRA, is an organization of Rehabilitation professionals. The National Center for Law and the Handicapped (NCLH) is an advocacy, research, and education organization, sponsored by the American Bar Association Family Law Section, the University of Notre Dame Law School, and the Council for the Retarded of St. Joseph County, IN. NCLH has appeared as *amicus curiae* in this Court and in federal and state courts throughout the United States, frequently addressing the meaning of Section 504 of the Rehabilitation Act of 1973.

SUMMARY OF ARGUMENT

In *Lloyd v. Regional Transportation Authority,* 548 F.2d 1277 (C.A. 7 1977), the Court of Appeals for the Seventh Circuit held that Section 504 of the Rehabilitation Act of 1973 provided a private right of action. The Seventh Circuit reached its conclusion on the basis of the legislative history of the statute and the principles established in *Cort v. Ash,* 422 U.S. 66 (1975). Every other circuit which considered the issue followed *Lloyd,* as did the District Courts. *Lloyd* speculated that the right of action it recognized required prior exhaustion of administrative remedies, but left the question open as premature. The Fifth Circuit below was correct in holding that, under *Cannon v. University of Chicago,* 441 U.S. 677 (1979), Section 504 does not require exhaustion.

This Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979) held that, on the record before the Court, the plaintiff was not an otherwise qualified handicapped individual as defined by the Rehabilitation Act and regulations promulgated by the Department of Health, Education and Welfare (HEW). The college was not required to make the accommodations the Court thought necessary to permit her participation, but *Davis* recognized that, in some instances, the refusal to make changes or alterations for handicapped

individuals would violate Section 504. There is no question that the Respondent is qualified to pursue his curriculum, and the interpreter services he seeks are auxiliary aids specified in the regulations. HEW considered the cost of such accommodations and determined that they were feasible. The Court of Appeals below was correct in holding that *Davis* does not relieve Petitioners of the obligation to provide interpreter services.

ARGUMENT

I.

THE LOWER FEDERAL COURTS HAVE RECOGNIZED A PRIVATE RIGHT OF ACTION UNDER SECTION 504 WITHOUT REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The Court of Appeals below held that Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, created "a private individual right of action for equitable relief," reserving judgment on the question of whether the statute allowed suits for damages. 616 F. 2d at 132 (footnote omitted). In claiming that the Fifth Circuit erred on this point, the University takes a position contradicted by the clear weight of authority in other circuits which have considered the issue. These courts, as well as a number of District Courts, have held that Section 504 provides a private right of action to individual plaintiffs, who are not required to exhaust administrative procedures before seeking judicial remedies.

Because of the limits imposed by Rule 33.3 of this Court, *Amici* will not present an extended analysis of the principal cases relied upon by the Fifth Circuit, *Cort v. Ash*, 422 U.S. 66 (1975), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979). We will summarize the development of the

private right of action under Section 504 in the lower courts and identify the considerations which led the courts to grant the right to sue without exhaustion of administrative remedies.

In *Lloyd v. Regional Transportation Authority,* 548 F.2d 1977 (C.A. 7 1977), the first appellate case to recognize a private right of action, the Seventh Circuit rejected arguments that Section 504 was merely precatory. It viewed Section 504 as a civil rights statute intended to confer affirmative rights upon a protected class of handicapped individuals. The similarity between Section 504 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which the court found to be emphasized in the legislative history, formed the principal basis for its holding. It then concluded that the *Cort* criteria were satisfied and remanded to the District Court for a trial.

Lloyd met almost universal acceptance in the other circuits and in the District Courts. The Eighth Circuit in *United Handicapped Federation v. Andre,* 558 F.2d 416 (C.A. 8 1977), approved the *Lloyd* private right of action analysis. It remanded for the District Court to consider plaintiffs' claim challenging purchase of inaccessible buses in light of recently promulgated Department of Transportation regulations directing that federally-assisted local transit authorities make special efforts to serve handicapped individuals. Two Second Circuit cases followed *Lloyd* within months of the decision. *Kampmeier v. Nyquist,* 553 F.2d 296 (C.A. 2 1977), allowed two visually handicapped students to sue school officials who had excluded them from athletic programs. *Leary v Crapsey,* 566 F.2d 863 (C.A. 2 1977), another transportation case, followed *Lloyd* and *Andre* and remanded for the District Court to consider the plaintiffs' claim in light of federal transportation regulations. The Third Circuit, in *Doe v. Colautti,* 592 F.2d 704 (C.A. 3 1979), while ruling against mentally ill plaintiffs

challenging medical assistance policies, recognized the right to sue. *Ibid.* at 708, n. 8. The Fourth Circuit recognized a private right of action. *Davis v. Southeastern Community College,* 574 F.2d 1158 (C.A. 4 1978), *reversed on other grounds,* 442 U.S. 397 (1979). Several recent cases, *National Association for the Advancement of Colored People v. Medical Center,* 599 F.2d 1047 (C.A. 3 1979) (handicapped plaintiffs challenging the location of a planned hospital to be built with federal assistance); *New York State Association for Retarded Children v. Carey,* 612 F.2d 644 (C.A. 2 1979) (retarded children with Hepatitis B challenging their exclusion from integrated public school placement); *Baker v. Bell,* 630 F.2d 1046 (C.A. 5 1980) (handicapped plaintiffs challenging inaccessible public transportation); and *Tatro v. State of Texas,* 625 F.2d 557 (C.A. 5 1980), (four-year old handicapped child with spina bifida suing school officials who refused to provide clean intermittent catheterization under Section 504 and the Education for All Handicapped Children Act, 20 U.S.C. 1401 *et. seq.*) reiterate the holdings in those circuits.[1]

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[1]

In *Snowden v. Birmingham-Jefferson County Transit Authority,* 551 F.2d 862 (C.A. 5 1977), the Fifth Circuit affirmed *per curium* and without opinion a District Court case which had ruled against plaintiffs on the merits of a Section 504 claim challenging the purchase of inaccessible buses. The District Court did not address the issue of the right to sue under Section 504. 407 F. Supp. 394 (N.D. AL. 1975). Two other federal appellate cases, which concluded that Section 504 prohibited employment discrimination only in federally assisted programs funded primarily to provide employment, may be read as recognizing a general right of action since the courts reached that specific issue. *Trageser v. Libbie Rehabilitation Center,* 590 F.2d 87 (C.A. 4 1978), *cert denied,* 442 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District,* 620 F.2d 672 (C.A. 8 1980), *cert. denied,* 449 U.S. ——— (1980). The Seventh Circuit recently reiterated its conclusion in *Lloyd* in *Simpson v. Reynolds Metal Co.,* 629 F.2d 1226 (C.A. 7 1980) and in *Adashunas v. Negley,* 626 F.2d 600 (C.A. 7 1980).

Amici note the recent Fifth Circuit case of *Counts v. U.S. Postal Service,* 631 F.2d 46 (C.A. 5 1980), holding that a plaintiff challenging

Several significant District Court cases illustrate the same trend at that level. Prior to *Lloyd*, two reported cases had granted injunctive relief, partially on the basis of Section 504, without considering whether the statute conferred a private right of action. In *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. VA. 1976), the court enjoined the exclusion of a first-grade student with spina bifida from placement in integrated public school classes as a violation of Section 504, the predecessor legislation to the Education for All Handicapped Children Act, *supra*, and the Fourteenth Amendment. In *Bartels v. Biernat*, 405 F. Supp. 1012 (E.D. WI. 1975), the court preliminarily enjoined federal and municipal transportation officials from using federal funds to purchase buses inaccessible to wheelchair users as a violation of Section 504 and federal transportation legislation. In the court's subsequent permanent injunction, 427 F. Supp. 226 (E.D. WI. 1977), it relied upon *Lloyd* and indicated that it would look to the same transportation regulations later cited in *Andre* and *Leary*, *supra*, to implement a remedy.

After *Lloyd*, the reported cases show no disagreement about the right to sue under Section 504. *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. FL. 1977), 451 F. Supp. 954 (M.D. FL. 1978), enjoined, on the basis of Section 504 and the Fourteenth Amendment, the refusal of police officials to hire an applicant because of his childhood history of epilepsy. *Vanko v. Finley*, 440 F. Supp. 656 (N.D. OH. 1977), and *Atlantis Community v. Adams*, 453 F. Supp. 825 (D. CO. 1978), allowed handicapped plaintiffs to challenge inaccessible

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employment discrimination under the 1978 amendment to Section 504, 29 U.S.C. 794a(a)(1), must exhaust administrative remedies. This provision applies solely to claims against the federal executive branch and the Postal Service. It incorporates the administrative remedies provided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and *Counts* is based entirely on Title VII case law. The decision is clearly distinguishable from the Title VI-based cases upon which the instant case relies. *Counts* does not refer to the *Lloyd* line of cases.

transportation services, but, in both cases, concluded that the questioned policies complied with Section 504 and federal transportation legislation. *Whitaker v. City University of New York*, 461 F. Supp. 99 (E.D. NY. 1978), allowed a faculty member who alleged he was discharged because of alcoholism to sue under Section 504 without exhausting administrative remedies.

While *Lloyd* established the right to be heard in federal court, it did not resolve whether the plaintiffs could sue directly without exhausting administrative remedies or whether courts were restricted in Section 504 cases to a limited review of agency action. *Lloyd* interpreted the congressional committee reports stating that Section 504 should "permit a judicial remedy through a private action" to "contemplate judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286. No administrative remedies to enforce Section 504 existed when *Lloyd* was decided and the Seventh Circuit justified its recognition of a private right of action by *Cort v. Ash, supra*, and by its understanding that:

> . . . [I]t is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts (footnote and citation omitted).

548 F.2d at 1286.

This language in the text of the *Lloyd* opinion was tempered by a confusing footnote in which the Seventh Circuit expressly left open as premature the question of whether the judicial remedy established would be limited to post-adminis-

trative judicial review once procedural enforcement regulations were issued. 548 F.2d at 1286, n. 29. Nevertheless, the court went on to state that, once a "meaningful administrative enforcement mechanism" existed, the private right of action under Section 504 "should be limited to *a posteriori* judicial review." *Ibid.* While recognizing a private right to sue and suggesting that Congress intended for it to be exercised after administrative review had been completed, *Lloyd* simultaneously questioned whether that cause of action was the sole remedy to parties complaining of Section 504 violations. Additionally, the court's statement about *a posteriori* review was itself predicated on the assumption that the administrative enforcement process would provide effective resolution of complaints. As we argue below, however, the Seventh Circuit language on exhaustion was *dictum* and does not create a conflict with the Fifth Circuit's holding in the instant case.

The *Lloyd* case established an important right, but also created a fundamental ambiguity about the nature of that right. The Fifth Circuit in the instant case acknowledged the problem when it quoted footnote 29 in *Lloyd* and stated, "We reject this argument." 616 F.2d at 132. In holding that Section 504 created a private right of action independent of any requirement to exhaust administrative remedies, it reached the same conclusion as the Third Circuit in *National Association for the Advancement of Colored People v. Medical Center, supra.* At the time of the Second Circuit decision in *Leary v. Crapsey, supra,* and the Eighth Circuit decision in *United Handicapped Federation v. Andre, supra,* administrative procedures did not exist to hear Section 504 complaints against recipients assisted by the United States Department of Transportation; therefore, these courts had no occasion to consider the exhaustion question. *Doe v. Colautti, supra,* did not consider the exhaustion question explicitly, but did allow the plaintiffs to sue directly, citing *Lloyd, Leary,* and *Andre.* In the two other Second Circuit cases, *Kampmeier v. Nyquist,*

supra, and *New York State Association for Retarded Children v. Carey, supra*, the courts apparently did not consider the exhaustion question. The Fifth Circuit panel in *Tatro v. State of Texas, supra*, while holding that the school district had violated Section 504, did not address either the private right of action or exhaustion questions under that statute, but characterized the state remedies followed by plaintiffs under their companion claim pursuant to the Education for All Handicapped Children Act, *supra*, as a "fruitless pursuit." 625 F.2d at 559. *Tatro* did cite the opinion of the Fifth Circuit panel in the instant case with approval on the *Davis* issue and may have implicitly acknowledged the private right of action. A third Fifth Circuit panel, in the most recent federal appellate decision recognizing the right to sue under Section 504, *Baker v. Bell, supra*, also cited the instant case with approval. *Baker* remanded to the District Court with instructions to conduct a *de novo* review of the Section 504 claim; although administrative procedures now exist for complainants to follow in challenging the purchase of inaccessible transit vehicles, 49 C.F.R. Subpart F, the Fifth Circuit made no reference to them.

The Third Circuit's decision in *Medical Center, supra*, and the opinion of the Fifth Circuit in the instant case, expressly rejecting the *Lloyd* language in footnote 29, might appear to create a conflict among the circuits over the exhaustion question. *Amici* submit, however, that the Third and Fifth Circuit cases, instead of conflicting with the Seventh Circuit, actually answer the question left open in *Lloyd*. The consistency between the instant case and *Lloyd* is more evident in light of the factual dispute before the Seventh Circuit. The *Lloyd* plaintiffs sued to enjoin the expenditure of federal transportation funds for inaccessible vehicles. At the time of the decision, no substantive or procedural regulations existed to implement Section 504. The Department of Health, Education and Welfare (HEW) had issued proposed substantive

rules, 41 F.R. 29548 (July 16, 1976), which indicated that administrative enforcement of Section 504—Title VI—Title IX complaints would be through a revised consolidated procedural regulation. These proposed Section 504 regulations stated that, until the consolidated rule was adopted, complaints under the statute would be resolved under the existing Title VI procedures. The consolidated procedural rule was never issued, and both Section 504 and Title IX complaints are still processed under the Title VI regulations. When HEW issued its final Section 504 regulations, 42 F.R. 22676 (May 4, 1977), it incorporated the Title VI procedures by reference. *Ibid.* at 22685, 45 C.F.R. 84.61.

The HEW proposed regulations cited in *Lloyd*, as well as the final rules, applied only to complaints charging violations of Section 504 by recipients of federal financial assistance from HEW. *Lloyd* involved financial assistance from the Department of Transportation, not HEW. The HEW procedures would not have been applicable to the *Lloyd* dispute in any event. HEW had been given authority by Executive Order 11914, 41 F.R. 17871 (April 29, 1976), to promulgate guidelines for other departments and agencies in developing their own Section 504 regulations. These guidelines were issued at 43 F.R. 2132 (January 13, 1978), 45 C.F.R. Part 85. The Department of Transportation had issued interim substantive regulations for accessible transit service in 1976, 49 C.F.R. 613.204 with Appendix, (41 F.R. 18234, April 30, 1976), Appendix to 23 C.F.R. 450.120 (41 F.R. 18234, April 30, 1976); it did not establish an administrative resolution process for Section 504 complaints until July 2, 1979, when it also revised its substantive rules. 49 C.F.R. Subpart F.

There were no administrative remedies to exhaust in *Lloyd*, and the Seventh Circuit acknowledged that "administrative remedial machinery does not exist to vindicate" the plaintiffs' rights under Section 504. 548 F.2d at 1286. The decision held

that the private right to sue was consistent with the principles of *Cort v. Ash, supra.* It was not necessary for the court to decide if Section 504 claims required exhaustion of administrative remedies in order to reach this result, and its statements about *a posteriori* judicial review may be considered *dictum.* In this light, the precedental value of *Lloyd* on exhaustion is diminished, and any conflict between the Seventh Circuit and the Fifth Circuit in the instant case disappears. The Court of Appeals below ruled clearly on the exhaustion question presented by its case, in contrast to the speculation of the Seventh Circuit.

Recently, the Seventh Circuit has stated that *Leary, supra,* and *Andre, supra,* "may reflect an oversimplified view of [*Lloyd*] and [*ignore*] the limitations we there expressed." *Simpson v. Reynolds Metal Co.,* 629 F.2d 1226, 1229 (C.A. 7 1980), (footnote omitted). This statement apparently refers to the language of footnote 29 in *Lloyd* reserving the question of whether post-administrative review would be the sole judicial remedy available after administrative procedures had been established. 629 F.2d at 1230. In *Simpson,* the court again considered proposed, not final, regulations, this time issued by the Veterans Administration and concluded, "As in *Lloyd* . . . we expressly leave open the question whether a private cause of action under §504 should be limited to judicial review of administrative proceedings." *Ibid.,* n. 7. Citing this Court's decision in *Cannon v. University of Chicago, supra,* and noting the inadequacies in the Title IX enforcement scheme found there, the *Simpson* court stated:

> Given the similarity of Title V, Title VI, and Title IX enforcement procedures, we believe these same concerns over the absence of an effective administrative enforcement scheme would also apply to complaints under §504 challenging discrimination in programs funded by HEW or the VA.

Ibid.

The Fifth Circuit below concluded that Camenisch was not required to exhaust administrative remedies for three reasons: the procedures did not allow for the provisional, emergency relief he had sought; the HEW enforcement process was marked by "excessive administrative delays [which rendered the] administrative remedies inadequate to help him . . .," 616 F.2d at 134; and HEW itself had, in the Fifth Circuit's view, waived the exhaustion requirement, apparently through a Departmental official's affidavit stating that the backlog of unresolved administrative complaints compelled the Department to encourage complainants to seek alternative judicial remedies through the exercise of the private right of action under Section 504. 616 F.2d at 134, 136. The court's conclusion rested on the principle of *Bossier Parish School Board v. Lemon,* 370 F.2d 847 (C.A. 5 1967), *cert. denied,* 388 U.S. 911 (1967), that exhaustion is not required where administrative procedures are inadequate. It is also supported by this Court's language in *Cannon v. University of Chicago, supra,* that, when a private remedy "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 441 U.S. at 703.

In addition to deciding that the deficiencies of the administrative remedies rendered them inadequate to provide relief, the Fifth Circuit concluded that the structure of the process itself prevented effective enforcement of Section 504 by HEW. This holding follows *Cannon,* which concluded that the Title VI administrative procedures for Title IX complaints were not appropriate to resolve civil rights disputes. The procedures exclude complainants from participation in the Department's investigation and subsequent enforcement proceedings. Voluntary compliance agreements between HEW and recipients may be effected without the concurrence of a complainant. The ultimate sanction, a termination of federal financial assistance, is not only an inappropriate resolution

of individual complaints, but so rarely used that it provides no practical remedy.

The Title VI procedures considered by this Court in *Cannon* and the Fifth Circuit below are concerned more with maintaining harmony in a Federal system than with vindicating individual civil rights. They emphasize voluntary compliance in the resolution of complaints to avoid conflicts between the national government and recipients of federal financial assistance, of which many are units of state and local government. The concerns of individual complainants can be easily lost in this system, and the Fifth Circuit was correct in holding that effective enforcement of the rights guaranteed by Section 504 required direct, independent judicial action.[2]

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[2]

The University, in its Petition for Certiorari, states that *Trageser, supra,* "seemingly held that there is no 504 coverage unless the program in which discrimination is asserted has received federal financial assistance." *Pet. Cert.* at 15. Both *Trageser* and *Carmi, supra,* hold that Section 504 prohibits employment discrimination against otherwise qualified handicapped individuals only in programs funded primarily to provide employment. In *Simpson, supra,* the Seventh Circuit, while finding it unnecessary to decide if *Trageser* and *Carmi* are correct, cited "*dicta* in both cases," in which the two courts noted that, "Title VI . . ., upon which Title V [of the Rehabilitation Act] is based, does not provide a private judicial remedy for employment discrimination by institutions receiving federal funds unless the allegedly discriminatory act causes discrimination against the primary or intended beneficiaries of the federal financial assistance." *Ibid.* at 629 F.2d at 1234. The plaintiff in *Simpson* sued his employer, a private company, which received federal financial assistance only for a job training program funded by the Veterans Administration. The court held that the plaintiff could not maintain a Section 504 action for employment discrimination against the company because he was not a participant in, and hence not an intended beneficiary of, that program.

If the University is attempting to argue that Camenisch is not an intended beneficiary and cannot assert a claim under Section 504, these cases provide no support. First, the Court of Appeals below did not rule on this question. Second, *Simpson* distinguishes the situation of a private company receiving limited federal assistance from that of an

II.

SOUTHEASTERN COMMUNITY COLLEGE v. DAVIS DOES NOT BAR THE COURT OF APPEALS FROM ORDERING THE UNIVERSITY TO PROVIDE INTERPRETER SERVICES TO CAMENISCH.

The Court of Appeals concluded that this Court's decision in *Southeastern Community College v. Davis, supra,* did not justify the University's refusal to provide interpreter services for Camenisch. 616 F.2d at 133. The Fifth Circuit distinguished the instant case from *Davis,* first, on the ground that the auxiliary aid which Camenisch needed—an interpreter—differed significantly from the "individual attention" this Court felt Davis required. Interpreter services, which are specified as necessary auxiliary aids by the HEW regulations, 45 C.F.R. 84.44(d)(2), are consistent with the *Davis* language recognizing the need for some accommodations. Second, it read *Davis* to rest primarily on the assumption that the plaintiff there could never be a registered nurse; therefore, the college could not be required to make substantial adjustments in its curriculum for her. It distinguished Camenisch's case because ". . . he can obviously perform well in his profession." 616 F.2d at 133 (footnote omitted).

In *Davis,* this Court stated the issue to be whether Section 504 "forbids professional schools from imposing physical qual-

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education institution receiving substantial federal assistance, but permitting discrimination in specific privately funded projects. In the second situation, *Simpson* approved of cases applying a "unified entity approach" which allowed Title VI and Section 504 plaintiffs to assert discrimination claims against the institutions. 629 F.2d at 1233, n. 12. Third, the *Trageser* line of cases is based upon the premise that Section 504 implicitly incorporates the "primary objective" limitation on employment programs found in Section 604 of Title VI, 42 U.S.C. 2000d-3. The holdings of these cases are properly limited to employment discrimination claims.

ifications for admission to their clinical training programs." 442 U.S. at 400. The holding of *Davis* is not applicable to this case, because there is no question that Camenisch is qualified for his program, which apparently is not a clinical training curriculum.

The principal issue in *Davis* is the standards which a professional, clinical training program covered by Section 504 may properly impose on applicants for admission. This Court reversed the lower court decision, because it interpreted the Fourth Circuit to have required the nursing program to disregard Davis' physical handicap in evaluating her application and to consider accommodating her disability by means of modifications in its curriculum, which might be substantial. It concluded that neither Section 504 nor the HEW regulations required these actions, because both allowed postsecondary institutions to establish "legitimate physical qualifications [which] may be essential to participation in particular programs." 442 U.S. at 407 (footnote omitted). In this respect, Davis represents judicial deference to administrative rulemaking.

There was no dispute between this Court and the Fourth Circuit over the propriety of following the HEW regulations in determining Davis' qualifications. The Fourth Circuit directed the District Court and the college to reconsider her application in two matters which it concluded the HEW regulations required: her academic and technical qualifications (apart from her physical handicap) and the college's capacity to modify its program where she could not meet existing requirements. The Fourth Circuit ordered a re-evaluation, not her admission.

This Court reversed essentially because it read the regulations differently. It did not interpret them to prohibit the type of physical qualifications which the plaintiff challenged

and it was willing to consider the standards legitimate without any further inquiry. Because this Court decided that the regulations, on their face, did not require substantial changes, it apparently concluded that the Fourth Circuit erred in requiring the college to consider making the modifications. 442 U.S. at 409. As with its holding on the evaluation of the plaintiff's qualifications, its interpretation of the auxiliary aid provision represents judicial deference to administrative rules. *Davis* and the Fifth Circuit's holding in the instant case are consistent in that the Court of Appeals below did nothing more than enforce the same regulation which *Davis* considered and approved.

This Court imposed limits on the *Davis* holding. It wrote that "on the present record" it appeared unlikely that the plaintiff in *Davis* could benefit from the changes the regulation envisioned and that "the only evidence in the record" on the issue suggested that efforts far beyond the obligations imposed by the regulation would be necessary. 442 U.S. at 409. Neither this Court's opinion, nor the opinion by the appellate or district courts, indicate much factual information about the modifications needed—the requisite changes, their implementation by other programs which have trained scores of hearing impaired nurses,[3] and their cost. The entire *Davis* litigation reflects a pressing need for this information and, because of the limited record before this Court, its opinion must be read far more narrowly than the University contends.

The Fifth Circuit's holding in the instant case on auxiliary aids and *Davis* are distinguishable on at least three points. First, the Fifth Circuit simply enforced the provision of the regulation explicitly directing the University to provide in-

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[3]

Symposium Proceedings of the Supreme Court Davis Decision: Implications for Higher Education and Physically Disabled Students (Schrauder and Villing, eds.), pp. 47-60 (1980).

terpreter services; it did not embellish the regulation or apply it to require the University to do more. *Davis* sets forth the regulation in question with no indication of the Court's disapproval. 442 U.S. at 408-409, n. 9. Second, it is clear that this modification is far more limited than the alterations required in *Davis;* moreover, the costs associated with interpreter services can be more readily ascertained. Third, no question exists about Camenisch's qualifications to pursue his course of study.

Amici contend that two aspects of *Davis*—the Court's deference to the regulations and its acknowledgement of the limitations of the record before it—are clear and that *Davis* does not undercut the decision of the Court of Appeals in the instant case. However, the Fifth Circuit noted ambiguities in *Davis* and the need for "more clarification" about this Court's language concerning the obligation of Section 504 postsecondary recipients to make modifications in their programs for handicapped individuals. 616 F.2d at 133. The uncertainty referred to by the Fifth Circuit stems from this language in *Davis*:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial or administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable

> and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

442 U.S. at 412-413.

The Fifth Circuit relied upon portions of this language to support its statement that *Davis* "was clearly not intended to bar relief under this statute for all handicapped people in the future." 616 F.2d at 132. It interpreted the *Davis* language quoted to establish guidelines to delineate between those situations in which postsecondary recipients would be required to make modifications and those in which they would not be required. The quoted passage implicitly recognizes that a passive refusal to discriminate is not enough to insure compliance with Section 504.

This Court's position is consistent with those expressed by Congress,[4] by HEW and other agencies responsible for enforcing Section 504, and by federal courts considering the need to make changes necessary to implement the statute. The Court's statement about the need for accommodations is buttressed also by the findings of HEW in the rulemaking process that preceded the regulations:

> There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure

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[4]

The respective House and Senate committees with authority over the legislation proposing Section 504 wrote in their reports, "Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." H. Rep. No. 93-1457, 93d Cong., 2nd Sess. at 27 (1974); S. Rep. No. 93-1270, 93d Cong., 2nd Sess. at 27 (1974).

> genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

"Nondiscrimination on Basis of Handicap: Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 42 F.R. 22676 (May 4, 1977).

In this statement, HEW acknowledged the "very general language" of Section 504 and "the scant legislative history surrounding its enactment," both of which provided "little guidance as to how these complex issues should be resolved." *Ibid.* The HEW position has never been disavowed by Congress.[5] Consequently, this Court's recognition of the need

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[5]

The Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 92 Stat. 2982, amending the Rehabilitation Act, was enacted approximately 1½ years after HEW had issued its Section 504 regulations. These rules contained not only the auxiliary aids requirement of 45 C.F.R. 84.44(d)(2), but also requirements for substantial accommodations in employment practices (§84.12); to make programs physically accessible (§§84.22 and 84.23); to provide a "free appropriate public education" for handicapped students in pre-school, elementary, and secondary programs (§84.33); and for such miscellaneous services as procedures for effective communication with hearing impaired persons needing emergency health care from recipient hospitals (§84.52(c)). Moreover, the guidelines issued by HEW, pursuant to Executive Order 11914, 41 F.R. 17871 (April 29, 1976), for other executive departments and agencies to follow in enforcing their own

for accommodations and modifications in *Davis* is supported by the principal agency responsible for developing the regulations upon which the Section 504 administrative scheme exists and the one then most expert in the problems of handicapped people.

This Court's view is supported also by the lower federal courts which have considered modifications and accommodations required under Section 504. The leading case is still *Lloyd, supra,* in which the principal question was whether the statute provided a private right of action. In concluding that the plaintiffs did have the right to sue, the *Lloyd* court suggested the dimensions of the affirmative rights created by Section 504. Noting the similarity between Section 504 and Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, the Seventh Circuit analogized from this Court's interpretation of the 1964 law's application to federally-assisted public school programs that did not provide instruction for students who did not understand English:

> Under these [federal] standards there is no equality of treatment merely by providing [the handicapped] with the same facilities [as ambulatory persons] . . .; for [handicapped persons] who [can] not [gain access to such facilities] are effectively foreclosed from any meaningful [public transportation].

548 F.2d at 1284; quoting *Lau v. Nichols*, 414 U.S. 563 (1974)

Section 504 regulations, contain similar requirements to make changes and modifications. 45 C.F.R. Part 85, 43 F.R. 2132 (January 13, 1978). There is no indication that Congress disapproved of these regulations during consideration of the amendments or at the time of their enactment, November 6, 1978, as Public Law 95-602. The Department of Labor regulations implementing Section 504 contain accommodation requirements, 29 C.F.R. 32.13, 45 F.R. 66713 (October 7, 1980); these are illustrative of other agency regulations.

Lloyd decided only that handicapped plaintiffs could sue to enjoin the expenditure of federal funds to purchase inaccessible transit vehicles. It did not decide to what extent the defendants were required to make physical changes, directing instead that the District Court develop a record upon which that issue could be resolved. But the passage in *Davis* relied upon by the Court of Appeals below, after acknowledging that the continuation of past requirements and practices could deprive genuinely qualified handicapped individuals of the opportunity to participate in covered programs, spoke of other factors affecting the accommodations.

Davis recognized the need for accommodations, especially where they have been determined to be feasible by appropriate administrative agencies. Interpreter services are exactly such an accommodation. In determining that interpreter services were feasible, HEW clearly considered the cost of the accommodation. In response to "expressed concern about the costs of compliance" from colleges and universities, 42 F.R. at 22692, HEW recognized the resources available from state vocational rehabilitation agencies when it promulgated the auxiliary aid regulation, 45 C.F.R. 84.44(d)(2), in the commentary accompanying that provision:

> The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other

> institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

Ibid. at 22692-93.

Thus, in considering the financial costs of auxiliary aids, the Department identified two methods to reduce some costs. One was flexibility by which the postsecondary recipients could administer auxiliary services: "As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have such aids on hand at all times." *Ibid.* at 22693. Auxiliary aids could be provided in a reasonable way.

The second method was for the recipients to seek assistance from such other resources as state vocational rehabilitation agencies. These agencies receive substantial federal assistance pursuant to Title I of the Rehabilitation Act, 29 U.S.C. 701 *et. seq.*, to assist eligible individuals in preparing for and securing employment. In 1978, the new Title VII of the Act authorized state agencies to establish independent living projects for severely disabled adults, including those who may not be employable under traditional criteria. The broad range of services under the law could include interpreter services. 29 U.S.C. 796(e).

The general authority of a state agency to provide interpreters is evident by this illustrative section of the Casework Manual of Michigan Rehabilitation Services, permitting the agency to "pay for the cost of interpreter services on an hourly basis if they are not available through a similar benefit program in the community." Item 7400 (March, 1979). The state agencies, however, face some restrictions in providing interpreters. They provide them to clients, not institutions.

These clients must meet eligibility criteria, primarily concerned with their capacity to be employed. It is possible to envision instances where a college admits an individual not eligible for vocational rehabilitation services. This could occur where an individual is not considered employable or pursues a postgraduate or professional curriculum for which an agency will not pay.

Second, under the Rehabilitation Act, agencies must first identify and use "similar benefits" available from other programs before paying for a service directly, 29 U.S.C. 721(a)(8). Under proposed regulations to implement the Act and its 1978 amendments, agencies must give full consideration to any similar benefits available to handicapped persons. 44 F.R. 68564, 68589, Section 1361.47(b) (November 29, 1979). The similar benefits rule presented an obstacle in 1977 when the Commissioner of Rehabilitation Services of HEW issued an interim policy statement on the relationship between the state agencies and postsecondary recipients in the provision of auxiliary aids:

> Numerous inquiries have been received by [the Rehabilitation Services Administration] and [the Office for Civil Rights of HEW] for an interpretation of the 504 regulations (subpart E, §84.44(d)) as to the relative responsibilities of higher education institutions and State vocational rehabilitation agencies for ensuring the availability of educational aids to handicapped students . . . In response to the need for an early clarification of this issue, RSA has established an interim national policy which provides that State VR agencies may continue the provision of educational auxiliary aids for eligible clients (under Title I) in those situations where the educational institution does not have the capability itself to do so or has been unable to work out appropriate arrangements with other community resources. At the same time, State

> VR agencies are urged to work with educational institutions providing technical assistance to the extent possible in helping them accommodate to the special needs of severely handicapped students.

Program Instruction, RSA-PI-78-7 (December 15, 1977).

The Commissioner announced plans for further study of the question. He noted the similar benefits rule as "the most difficult issue to resolve." *Ibid.* at 4. A number of other difficulties concerned the need for agencies to determine eligibility and the scope of necessary services on an individual basis, imposition of financial needs tests to ascertain whether clients must contribute to the cost of auxiliary aids, and budgetary limitations.

This statement is the basis for federal and state policy for the provision of auxiliary aids by rehabilitation agencies at present. The use of similar benefits is reflected in the Michigan Casework Manual; they must be used in all cases "*to the extent that they are adequate, do not interfere with achieving the rehabilitation objective of the client and do not unnecessarily delay service.*" Item 7030 (March 1979), original emphasis. More recently, it is evident that state rehabilitation agencies have resisted assuming sole responsibility to provide auxiliary aids, because they believe that primary responsibility to provide aids rests with the recipients themselves. Nevertheless, it is clear that handicapped students and postsecondary recipients continue to receive some assistance from rehabilitation agencies for auxiliary aids. A complete description of that assistance requires evidence which is not in the record before the Court. *Amici* also note the recent decision of *Jones v. Illinois Department of Vocational Rehabilitation,* No. 79C5396 (N.D. IL. January 12, 1981) and the position of the United States as *amicus curiae* therein, apparently holding that the similar benefits rule does not relieve state agencies of the responsibility to provide interpreters. This case is the

first judicial decision ruling on the question, and it represents a divergence from the policy established by the Commissioner.

The responsibility for providing auxiliary aids to handicapped students remains unsettled at present. That uncertainty should not prevent this Court from recognizing the significant difference between the interpreter services required by Camenisch and the modifications considered necessary in the *Davis* opinion. In issuing the Section 504 auxiliary aid regulation, HEW expressly considered the problem of cost and concluded that the flexibility allowed to postsecondary recipients, as well as the potential assistance from rehabilitation agencies and other sources, did not impose the unreasonable burdens of which the University complains. *Amici* note that neither the Petition for Certiorari nor the Brief for the University specifies the costs incurred or anticipated in providing auxiliary aids. The opinion of the Court of Appeals below makes no reference to costs. The University, in effect, is asking the Court to conclude that it faces extraordinary burdens on the basis of speculation.

The question of costs for auxiliary aids cannot be answered abstractly. It is necessary to have more information about the experiences of universities in providing them (and the practices of state rehabilitation agencies in determining when interpreter services will be provided. What is clear is that HEW imposed the auxiliary aid requirement only after considering the impact of cost and suggesting ways for recipients to reduce the expense of aids. Thus HEW "identified an instance where a refusal to accommodate the needs of a disabled person amounts to discrimination." 442 U.S. at 413. Interpreter services are "[t]echnological advances [which] can be expected to enhance opportunities to rehabilitate the handicapped," and Camenisch sought them primarily to maintain his employment. 442 U.S. at 412. Section 84.44(d)(2) of the regulations, read with the accompanying commentary, represents HEW's deter-

mination that "auxiliary aids also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State." *Ibid.* The refusal of the University to modify its existing program by providing interpreter services for Camenisch is "unreasonable and discriminatory." 442 U.S. at 413. The Court of Appeals below properly held that *Davis* did not justify the University's refusal to provide the services and was correct in requiring an interpreter for Camenisch.

CONCLUSION

For the reasons set forth in this Brief, *Amici Curiae* urge the Court to affirm the judgment under review.

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No. 80-317

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL., PETITIONERS

v.

WALTER CAMENISCH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The United States will discuss the question whether petitioners violated Section 504 of the Rehabilitation Act of 1973 by refusing to provide a sign-language interpreter to assist respondent in the "program or activity" in which he participated.

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INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. (Supp. II) 794, prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance or * * * conducted by any Executive agency or by the United States Postal Service." The statute requires each executive agency to promulgate regulations governing enforcement of the antidiscrimination provisions within the federal government. In addition, the United States has substantial responsibility for implementing Section 504 in connection with federally funded programs conducted by private institutions and state and local governments. Executive Order No. 11914, 41 Fed. Reg. 17871 (1976), directed the Secretary of Health, Education, and Welfare to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of [S]ection 504." In response to this command, the Secretary issued detailed regulations. See 45 C.F.R. Parts 84 and 85.[1] Under the Secretary's regulations, federal grant agencies that detect actual or threatened violations of Section 504 may refer the matter to the Department of Justice with a recommendation that appropriate judicial proceedings be brought to enforce the rights of the United States under the statute. See 45 C.F.R. 84.61 and 45 C.F.R. 80.8. Executive Order No. 12250, 45 Fed. Reg. 72995 (1980), transferred from the Secretary to the Attorney General the responsibility for coordinating the implementation and enforcement of Section 504 by Executive Branch agencies. The Order provided that

[1] With respect to federally funded educational institutions, HEW's enforcement responsibility was transferred to the Department of Education by the Department of Education Organization Act, Pub. L. No. 96-88, Title III, 93 Stat. 677 *et seq.* HEW's regulations, as applicable to educational institutions, were recodified, without significant change, at 34 C.F.R. 104 *et seq.* Because petitioners continue to refer to HEW and its regulations, we do the same.

the regulations on this subject previously issued by the Secretary under Executive Order No. 11914 "shall be deemed to have been issued by the Attorney General * * * and shall continue in effect until revoked or modified by the Attorney General." 45 Fed. Reg. at 72997.

This case concerns the interpretation of the antidiscrimination provisions in Section 504. The Court's decision may also affect the validity of the administrative construction given the statute in HEW's regulations. Because the regulations and the statute directly affect the actions of all federal agencies and all recipients of federal funds, the United States participated in this case as amicus curiae in the court of appeals. For the same reason, the United States participated as amicus curiae in this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), an earlier case involving the application of Section 504. Finally, in response to the district court's decision in this case, respondent filed an administrative complaint with HEW alleging that petitioners' refusal to provide an interpreter violated Section 504. After an investigation, HEW found that petitioners had indeed violated Section 504 and its implementing regulations (App., *infra*, 9a-16a). Upon its creation, the Department of Education (ED) assumed responsibility for completing the processing of the complaint. ED recently stayed further administrative proceedings pending this Court's decision (App., *infra*, 17a-18a). ED therefore has a direct interest in the outcome of this case.

STATEMENT

A. Facts

Respondent Walter Camenisch is deaf (A. 30). Sometime before the fall of 1977, he was appointed Acting Dean of Students at the Texas School for the Deaf (A. 31). To obtain a permanent appointment to that position, respondent needed a master's degree (*ibid.*). For this reason, respondent enrolled in graduate school at the University of Texas, a state-supported institution of higher education (A. 30-31).

Respondent met all the academic and technical standards established by the University for admission to, and participation in, its graduate program (A. 30). Because he is deaf, however, he could not participate effectively in the classroom portion of the educational program without the assistance of a sign-language interpreter (A. 31). Respondent therefore asked the University to provide him with a sign-language interpreter to assist him in his classes (*ibid.*). The University refused this request (A. 31-32). It explained that its policy was to provide services of this kind only to those students meeting its financial aid standards. Respondent did not qualify for financial aid, even when the expense of an interpreter was added to respondent's other expenses (A. 31, 33-34, 40).

Unable to obtain the assistance of the University, respondent was forced to secure an interpreter at his own expense.[2] In all, respondent paid an interpreter $1,245 for assisting him in nine courses (A. 32).

B. Proceedings in the district court

In March 1978, respondent filed suit against the University and several university officials (A. 1, 4-8). He alleged that petitioners' failure to provide him with a sign-language interpreter violated Section 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment (A. 6-7). His complaint, which sought only declaratory and injunctive relief, asserted causes of action under Section 504 and under 42 U.S.C. 1983 (A. 4-8).

On the same day on which he filed suit, respondent moved for a preliminary injunction (A. 1, 16-17). At the hearing on this motion, respondent testified that he needed one further course in order to complete the requirements for his master's degree, that he intended to take this course

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[2] Respondent also unsuccessfully sought assistance from the Texas Rehabilitation Commission (A. 12). The Rehabilitation Commission denied assistance on the ground that respondent did not have a substantial employment handicap (*ibid.*).

during the summer of 1978, and that he would need a sign-language interpreter to complete the course successfully (A. 49-51). Respondent's counsel read to the district court the stipulations of fact summarized above (A. 45-48). In addition, the parties stipulated that the University annually receives more than $31,000,000 in federal financial assistance and that, as a condition of receiving that assistance, the University has agreed to comply with Section 504 of the Rehabilitation Act of 1973 (A. 48). The parties also stipulated that the University's budget for the year ending August 31, 1978 exceeded $200,000,000 (*ibid.*).

Petitioners did not introduce any evidence. They contended that because respondent did not meet the University's financial aid criteria, the University's only obligation under Section 504 and its accompanying regulations was to permit him to bring a sign-language interpreter into his classes and that the University had satisfied this obligation. Petitioners also argued that respondent was not entitled to relief because he had not filed a complaint with HEW (A. 56-57).

The district court granted respondent's request for a preliminary injunction and ordered petitioners "to procure an interpreter or other effective method of making orally delivered course materials available to [respondent] during his completion of his Master's work" (Pet. App. A-22). The court based its decision on the "substantial likelihood that [respondent would] ultimately prevail on the merits[,] * * * the relative costs to the parties, the public interest, * * * and the potential irreparable injury resulting from [respondent's] loss of employment" (Pet. App. A-21).

The court rejected petitioners' argument that respondent should be required to exhaust administrative remedies before obtaining preliminary relief. The court observed that "HEW regulations contain no provisions for providing emergency relief of the nature requested by [respondent]" and concluded therefore that "exhaustion procedures are meaningless with respect to [respondent]" (Pet. App. A-20 to A-21). Nonetheless, "as a condition

of preliminary injunctive relief," the court ordered respondent "to initiate a complaint with HEW" requesting the same relief sought in his lawsuit. The court stayed further judicial proceedings "pending a final administrative determination on the merits" (Pet. App. A-22). As an additional condition of injunctive relief, the court directed respondent to post a security bond guaranteeing petitioners' reimbursement in the event they ultimately prevail on the merits (*ibid.*).

C. The court of appeals decision

The court of appeals affirmed the district court's order granting preliminary injunctive relief but vacated that part of the order requiring respondent to file an administrative complaint with HEW (Pet. App. A-2). The court of appeals agreed with the district court's determinations that respondent would suffer irreparable injury in the absence of preliminary relief and that the posting of a security bond would protect petitioners from permanent harm (Pet. App. A-4 to A-5). The court also agreed that respondent was likely to succeed on the merits and that the public interest favored the granting of preliminary relief (Pet. App. A-5 to A-11).

The court ruled that Section 504 implicitly authorizes private litigation to enforce the statutes' antidiscrimination provisions. Rejecting petitioner's argument that the promulgation of regulations governing administrative enforcement of Section 504 deprived private parties of whatever independent litigating authority they may previously have enjoyed, the court of appeals noted that, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court found a private right of action under Title IX of the Education Amendments of 1972, despite the availability of administrative enforcement procedures identical to those provided for the enforcement of Section 504 (Pet. App. A-8 to A-9). The court of appeals concluded that *Cannon* "implicitly rejected the argument that these * * * procedures militate[] against the finding of a private right of action under Section 504" (Pet. App. A-9).

With respect to the substantive content of Section 504, the court of appeals was not persuaded by petitioners' argument that the decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), undermined the basis for the award of preliminary relief to respondent. In the court's view, *Davis* "was clearly not intended to bar relief under this statute for all handicapped people in the future" (Pet. App. A-10). The court of appeals stressed this Court's explicit recognition that a refusal to accommodate the needs of a disabled person can, in some instances, amount to discrimination against the handicapped and that HEW has an important responsibility in identifying those situations in which such illegal discrimination occurs (*ibid.*). The court distinguished the present case from *Davis* in two ways. First, the court said, "HEW regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of * * * sign language interpreters," whereas, in *Davis*, the applicable regulations "did not require the sort of 'individual attention' services that Mrs. Davis required to get through nursing school" (*ibid.*). Secondly, the court observed, while Davis's handicap precluded her "from ever realizing the principal benefits of the training" she sought, respondent "can obviously perform well in his profession" (Pet. App. A-11).

The court of appeals held that the district court correctly granted preliminary injunctive relief without requiring respondent first to exhaust administrative remedies. The court of appeals did not rely, however, on the absence of any provision for emergency relief in the HEW regulations. Rather, the court concluded that exhaustion of administrative remedies is simply not a prerequisite for private litigation under Section 504. Following *Cannon*, the court determined that an exhaustion requirement would be inappropriate because the administrative enforcement scheme established by HEW's regulations does not permit a private person to participate in the administrative investigation and resolution of a

complaint he has filed and because the funding termination remedy that the agency may impose at the end of that process does not guarantee individual relief for the aggrieved party (Pet. App. A-14 to A-16). The court of appeals therefore vacated that part of the district court's order requiring respondent to file an administrative complaint as a condition of obtaining preliminary injunctive relief.[3]

SUMMARY OF ARGUMENT

I

In enacting Section 504 of the Rehabilitation Act of 1973 and the subsequent amendments to that statute, Congress expected and intended that recipients of federal funds would sometimes need to spend money in order to accommodate qualified handicapped persons and permit their participation in federally funded programs and activities. This Court recognized that general proposition in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.10, 412-413 (1979), and it should not be rejected now. Acceptance of petitioners' argument that Section 504 imposes no financial obligations whatever on institutions receiving federal aid would seriously diminish the effectiveness of Section 504 in accomplishing its goal of improving educational and other opportunities available to qualified handicapped persons. Moreover, petitioners' proposed statutory interpretation is contrary to the pre-enactment history of Section 504, to subsequent

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[3] The court noted that, since the district court's decision, respondent has completed his master's degree and HEW has issued a letter finding petitioners in violation of Section 504 (Pet. App. A-3 n.3, A-5). The court concluded that neither of these events makes the controversy moot. The fact that respondent has already received the relief he requested does not make the case moot, the court explained, because respondent has posted a bond that can be used to repay petitioners if they ultimately prevail on the merits (Pet. App. A-5). The court concluded that the letter of findings does not render the case moot because a private suit is independent of administrative proceedings and therefore "stands by itself" (Pet. App. A-6 n.5).

legislative action concerning the handicapped, and to this Court's ruling in *Lau* v. *Nichols*, 414 U.S. 563 (1974), under a statute analogous to Section 504—Title VI of the Civil Rights Act of 1964.

II

As petitioners apparently now concede, the regulations promulgated by the Secretary of HEW under Section 504 required the University of Texas to provide respondent with a sign-language interpreter to assist him in the master's degree program in which he was enrolled. These regulations are designed to assist only qualified handicapped persons, and they were issued, under congressional authority, with a full appreciation of the need to avoid imposition of undue financial and administrative burdens on recipients of federal funds. See *Southeastern Community College* v. *Davis*, *supra*, 442 U.S. at 412. The Secretary reasonably anticipated that the obligations imposed on recipients of federal funds by the so-called auxiliary aid regulation, 45 C.F.R. 84.44(d), could ordinarily be met through reliance on public agencies, private charitable organizations, or student volunteers. In any event, the requirements established by the regulation have not been shown to be unduly burdensome in this case, and it appears certain that the cost of providing sign-language interpreters to qualified deaf students who need them represents but a small fraction of the annual federal aid received by the University of Texas. Under such circumstances, it cannot be said that the challenged regulation is not "reasonably related to the purposes of the enabling legislation," and the Secretary's method of implementing the statutory command should therefore be sustained. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 280-281 (1969); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

ARGUMENT

I

CONGRESS INTENDED, AND THIS COURT HAS RECOGNIZED, THAT IN CERTAIN CIRCUMSTANCES RECIPIENTS OF FEDERAL FUNDS WILL NEED TO EXPEND FUNDS IN ORDER TO AVOID DISCRIMINATION AGAINST OTHERWISE QUALIFIED HANDICAPPED PERSONS IN A FEDERALLY FINANCED PROGRAM OR ACTIVITY

The government's principal concern in this case is to defend and reaffirm a fundamental proposition recognized by this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.10, 412-413 (1979), namely, that, on some occasions, the antidiscrimination provisions in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, require recipients of federal funds to spend money in order to accommodate handicapped persons and permit their participation in federally funded programs and activities. Petitioners now attempt to justify their refusal to provide a sign-language interpreter for respondent on the broad ground that "Section 504 does not require a covered institution to expend monies to make programs accessible" (Pet. Br. 5). This argument is inconsistent with the congressional understanding of Section 504 and with this Court's interpretation of the statute in *Davis*.

In *Davis*, this Court expressly acknowledged that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory" (442 U.S. at 412-413). Moreover, the Court recognized that HEW has "an important responsibility" to identify "those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped," in violation of Section 504 (442 U.S. at 413). In particular, the Court pointed to the statutory authorization for federal grants to finance "such information and technical assistance (including support personnel such as interpreters for the deaf) as may be

necessary to assist [recipients of federal funds] in complying with * * * the requirements of section 504" (442 U.S. at 411 n.10, quoting 29 U.S.C. (Supp. II) 775(a)). The Court concluded from this statutory language that "on occasion the elimination of discrimination might involve some costs" (*ibid.*).

Petitioners' insistence that Section 504 "was not, and is not, intended to impose financial obligations on the states or state institutions" (Pet. Br. 8) flies in the face of this Court's interpretation of the statute in *Davis*. Petitioners have not always embraced such an extreme position. In the district court, they argued only that Section 504 does not preclude the University of Texas from applying its usual financial need criteria in evaluating respondent's request for a sign-language interpreter (A. 57-58), not that Section 504 imposes no financial obligation on recipients of federal funds. Petitioners did not challenge any of HEW's regulations under Section 504; they merely contended that, in respondent's case, the University had fulfilled its obligation to "take such steps as are necessary to insure" that an otherwise qualified handicapped student is not excluded from participation in a federally funded educational program (A. 57). See 45 C.F.R. 84.44(d).[4]

This position was repeated and developed further in a January 1979 letter from petitioner Lorene Rogers, the President of the University of Texas, to HEW's Office of Civil Rights in Dallas (App., *infra*, 1a-5a). The letter was the University's response to HEW's invitation to comment on the administrative complaint filed by respondent as a condition of the preliminary injunctive relief ordered by the district court. Referring to Section

[4] In September 1978, when petitioners filed their brief on appeal in the Fifth Circuit, they alluded to the substantive argument made in the district court but challenged the grant of preliminary injunctive relief only on the procedural grounds that Section 504 does not create a private cause of action and that respondent had failed to exhaust his administrative remedies. See Brief for Appellants 5-27.

504 and to HEW's regulation governing auxiliary educational aids, 45 C.F.R. 84.44(d), the University suggested that auxiliary aids within the meaning of the regulation can appropriately be divided into two classes, durable and consumable.[4a] The University did not comment on the locus of financial responsibility under Section 504 for the provision of durable auxiliary aids. With respect to consumable aids, the University stated (App., *infra*, 3a-4a):

> If an applicant for *consumable* educational auxiliary aids does not have the financial resources equivalent to his/her projected need-based budget, the University will provide the funds necessary to insure that the student is not deprived of any educational opportunity due to the absence of auxiliary aids. In fact, financial assistance has been committed by the University this semester to assist in paying for a qualified deaf interpreter for another student.

Repeating the argument it had made in the district court, the University observed that the applicable HEW regulation, 45 C.F.R. 84.44(d), requires recipients of federal funds, not to provide auxiliary aids, but only to "take such steps as are necessary to ensure" that handicapped students are not excluded from federally funded educational programs due to the absence of auxiliary aids. The University stated that the regulation was drafted in this way to make clear that recipients of federal funds are not themselves required to provide auxiliary aids if such aids are available from other sources. The University then concluded (App., *infra*, 4a): "We are unaware of any qualification that states

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[4a] The University defined durable aids as "those which, once provided, allow multiple use by successive classes of students. Such durable auxiliary aids include, among others, building modifications, ramps, taped texts and braille computer terminals" (App., *infra*, 2a). Consumable aids, in the University's lexicon, are "those expendable single-use services which are provided by an individual to a student on a one-on-one basis and, once provided, cannot be reused. Examples in this category include wheelchair attendants, deaf interpreters and individual readers" (*ibid.*).

the alternative provider may not be [the handicapped student himself], assuming he/she has adequate financial resources."

In January 1980, seven months after this Court's decision in *Davis* and shortly before the oral argument in the court of appeals in the present case, petitioners wrote to the clerk of the court of appeals (App., *infra*, 6a-8a) in order to call *Davis* to the court's attention. Even at that late date, petitioners did not argue that Section 504 does not require any expenditure of money by recipients of federal funds. Rather, they merely stated that the University was not required to provide an individual interpreter for respondent and that the University had already "taken all other necessary steps to accommodate [respondent's] handicap" (App., *infra*, 7a).

For the first time in their petition for rehearing in the court of appeals, petitioners adopted the extreme position they now press in this Court. We have reviewed the history of this controversy not to suggest that petitioners failed to preserve their point adequately in the courts below but rather to demonstrate that, both before and after *Davis*, petitioners assumed that compliance with Section 504 requires recipients of federal funds to bear some costs in appropriate circumstances. The Court recognized as much in *Davis*, and there is no basis for reexamination of this established interpretation of Section 504.

There is no doubt that Congress expected and intended that universities and other recipients of federal financial assistance would spend some of their money to accommodate qualified handicapped persons and thus prevent their exclusion from programs and activities supported by the federal government. Petitioners should not be permitted to prevail simply by arguing that any financial outlay by the University of Texas is an affirmative act and this Court said in *Davis* that Section 504 does not "impose an affirmative action obligation on all recipients of federal funds" (442 U.S. at 411). The evidence that

Congress intended at least some expenditures was recounted at length in the brief for the United States as amicus curiae in *Davis* (Br. 25-38, 44-55),[5] and we do not repeat that entire discussion here. We merely highlight some points and supplement the earlier treatment with information about the legislative antecedents of Section 504.

The forerunner of Section 504 was the so-called Humphrey-Vanik bill to amend Title VI of the Civil Rights Act of 1964. The proposal would have added "physical or mental handicap" to the list of personal characteristics designated by Title VI as impermissible bases for discrimination in federally funded programs. See H.R. 12154, 92d Cong., 1st Sess. (1971); S. 3044, 92d Cong., 2d Sess. (1972), reprinted in 118 Cong. Rec. 526 (1972).[6] The bill would have had substantially the same effect as Section 504.[7] In explaining the need for the legislation, both Representative Vanik and Senator Humphrey repeatedly emphasized that handicapped persons had been denied educational opportunity because of the absence of special services. 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik); 118 Cong. Rec. 464, 1595, 4341-4342, 30390 (1972) (same); *id.* at 525, 9495 (remarks of Sen. Humphrey).

Representative Vanik acknowledged that the states had "plead[ed] lack of funds" (118 Cong. Rec. at 4341) and that providing equal educational opportunity to handicapped students would be "burdensome to the schools"

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[5] We are supplying the parties with copies of the government's brief in *Davis*.

[6] The Humphrey-Vanik bill included an exception for those situations in which lack of a physical or mental handicap "is a bona fide qualification reasonably necessary to the normal operation of * * * [a federally funded] program or activity."

[7] Both Senator Humphrey and Representative Vanik spoke in support of Section 504 and expressed the understanding that Section 504 would effect the intent of their original bill. 118 Cong. Rec. 32310 (1972) (statement of Sen. Humphrey); 119 Cong. Rec. 18137 (1973) (remarks of Rep. Vanik).

(117 Cong. Rec. at 45975). Nevertheless, he insisted that handicapped persons are entitled to equal educational opportunity "as U.S. citizens" (*ibid.*). Senator Humphrey likewise recognized that the denial of equal educational opportunity did not necessarily result from prejudice but was frequently caused by "problems of transportation and architectural barriers" (118 Cong. Rec. at 525). But, Senator Humphrey said, whatever the explanation for the exclusion of handicapped persons, "the injustice of exclusion remains" (*ibid.*). These remarks by the cosponsors of the precursor to Section 504 show that, from the beginning, congressional consideration of proposed measures to bar discrimination against the handicapped in federally funded programs was informed by the realization that achievement of the legislative goal would cost money and that some of the financial burden might have to be borne by the institutions receiving federal funds.

The congressional expectation that recipients of federal funds would need to spend money in order to enable handicapped students to participate effectively in funded programs or activities is most clearly evidenced by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Title I, 92 Stat. 2955 *et seq.* See generally the brief for the United States as amicus curiae in *Davis*, at 44-45. As already mentioned (see page 10, *supra*), Section 115(a) of the 1978 amendments authorized grants to states for the establishment and operation of comprehensive rehabilitation centers that "shall provide * * * to local governmental units and other public and private nonprofit entities located in the area such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." 29 U.S.C. (Supp. II) 775(a).

Congress also added several other provisions designed to improve the availability of auxiliary educational aids

for the handicapped and thus to ease the burden of compliance with Section 504. Interpretive services for the deaf were explicitly included among the auxiliary aids Congress had in mind. For example, Section 114(3) of the 1978 amendments authorized grants to assist public or private nonprofit organizations in establishing or operating 12 programs "[f]or the purpose of training a sufficient number of interpreters to meet the communications needs of deaf individuals." 29 U.S.C. (Supp. II) 774(d). Section 116(2) of the amendments authorized the Commissioner of the Rehabilitation Services Administration to make grants for the purpose of "establish[ing] within each State a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals." 29 U.S.C. (Supp. II) 777e. These statutory provisions evidence the congressional recognition that Section 504 imposes some financial obligation on recipients of federal funds. They also reflect the legislative commitment to help recipients meet their Section 504 responsibilities to handicapped persons. In presenting the conference committee report on the 1978 amendments to the full House of Representatives, one of the House conferees, Representative Jeffords, explained (124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978)):

> As a result of Section 504 it has become clear to many that [Section 504] means more than just removing architectural barriers for the physically handicapped. While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. People who are deaf face communication barriers which are just as great as the architectural barriers faced by those in wheelchairs. * * * One of the biggest problems facing the deaf throughout the country is the lack of interpreters to allow them to function within a hearing society. Not only are there not

> enough interpreters, there are specifically not enough trained interpreters. The provision in this conference report will establish 12 interpreter-training centers and interpreter pools within each State and help to alleviate these problems and make section 504's nondiscrimination policies meaningful as well as applicable to them.

These remarks were made on the floor of the House moments before the House agreed, by a vote of 365-2, to accept the conference committee report (124 Cong. Rec. at H13476).

In addition to measures directly addressed to helping the deaf, the 1978 amendments included other provisions that reflect the congressional understanding that compliance with Section 504 may require monetary expenditures by recipients of federal funds. For example, Congress directed the Architectural and Transportation Barriers Compliance Board to report on "the amounts required to be expended by States and by political subdivisions thereof to provide handcapped [*sic*] individuals with full access to all programs and activities receiving Federal assistance." 29 U.S.C. (Supp. II) 792(h)(1). Congress authorized the Secretary of HEW to "provide, directly or by contract, financial assistance to any public or nonprofit agency, institution, or organization for the purpose of removing architectural, transportation, and communication barriers." 29 U.S.C. (Supp. II) 794b(3). Representative Jeffords was the author of these provisions. In describing them to the full House of Representatives, he carefully observed that, although Congress intended to assist recipients of federal funds in fulfilling their obligations under Section 504, those obligations are not dependent on the availability of federal grants earmarked for aid to the handicapped. Representative Jeffords stated (124 Cong. Rec. at H13474):

> On section 504 itself, the conferees accepted a provision that I offered calling for a study within each State to find out what the actual costs of implementing section 504 of this act will be. We keep

> hearing that section 504 is going to be so expensive to implement, but every time I or any other Member of Congress try to get money to carry out 504, somebody comes back to say that they do not know what the costs are and nobody has done a study. Hopefully, a study will be done in the next year and we should have the cost projections and answers we require. Another provision which I authored could be brought into effect and that would be to get the Federal Government to provide money to help States and localities implement section 504. I must emphasize so that there is no misunderstanding that my insistence that the Federal Government pay part of the costs is in no way to negate or minimize the removal of barriers for the handicapped, or in any way to halt or delay action until the Federal Government puts up some money. My goal is clear and it is to get the Federal Government, which made the law, which wrote the regulations to pay for at least part of the costs so that the full burden does not fall on the State or local governments or on public or private institutions throughout the country.

Finally, in another statute enacted 10 days before the 1978 Rehabilitation Act amendments, Congress expressly found and declared that "due to the rapid implementation of programs to assist handicapped individuals mandated under the Education for the Handicapped Act and section 504 of the Rehabilitation Act of 1973, there is a need for people to provide the special supportive services and removal of architectural barriers required by these Acts." 29 U.S.C. (Supp. II) 876(a)(1). To meet this need, Congress directed the Secretary of HEW to establish programs "which provide individuals with skills necessary to train or provide assistance to handicapped persons, including, but not limited to, interpreters for the deaf and aides in classrooms to assist in the education of the handicapped." 29 U.S.C. (Supp. II) 876(b). These provisions, both part of the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909, 1912, further show that Congress in-

terpreted Section 504 to require certain financial outlays by recipients of federal funds.[8]

Even without the foregoing strong indications of congressional intent, we believe that Section 504, standing alone, would be enough to establish that recipients of federal funds may be required to spend money in order to avoid discrimination against the handicapped in violation of the statute. That is precisely what this Court held in *Lau* v. *Nichols*, 414 U.S. 563 (1974), in the analogous context of a suit under Title VI of the Civil Rights Act of 1964. Section 601 of the Civil Rights Act, 42 U.S.C. 2000d, prohibits discrimination on the basis of "race, color, or national origin" in the same way that Section 504 prohibits discrimination on the basis of handicap. The statutory language of Section 601, like that of Section 504, does not specifically mention any financial obligation on the part of recipients of federal funds. Yet, on review of a local school district's failure to provide English-language instruction or a bilingual curriculum or some other form of assistance to enable Chinese-speaking students to participate effectively in a federally funded educational program, this Court found a violation of Section 601 and remanded "for the fashioning of appropriate relief" (414 U.S. at 569). Although the Court did not specify what kind of relief should be ordered, any effective form of relief obviously would have entailed at least some expense for the local school district, the recipient of federal funds.[9]

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[8] Congress thought that the benefits of the Rehabilitation Act of 1973 would far exceed its costs. As the Senate Committee on Labor and Public Welfare observed in its report on the Act, handicapped persons trained to participate productively in society will contribute to the gross national product and will pay federal, state, and local taxes. At the same time, they will no longer be dependent on public assistance or private charity. See S. Rep. No. 93-318, 93d Cong., 1st Sess. 12 (1973).

[9] See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-436 (1971) (compliance with Title VII of the Civil Rights Act of 1964

If accepted, petitioners' contention that Section 504 never requires recipients of federal funds to spend any money in order to avoid excluding otherwise qualified handicapped persons from federally funded programs would signal the end of nearly all compulsory measures to aid the handicapped under Section 504. Recipients of federal funds would not have to build a single ramp to make campus buildings accessible to handicapped persons. They would not be required to modify a single bathroom so that it could be used by handicapped persons. They would not be obliged to undertake any effort at all to enable qualified handicapped persons to participate in federally funded programs, if that effort involved even the slightest identifiable expense. This cannot be what Congress intended when it passed Section 504. Whatever the Court concludes is the proper resolution of respondent's individual claim, it should decline petitioners' invitation to construe the statute in such a way as to drain it of nearly all practical impact.

II

THE SECRETARY OF HEW HAS REASONABLY AND CONSISTENTLY INTERPRETED SECTION 504 TO REQUIRE RECIPIENTS OF FEDERAL FUNDS TO ENSURE THE PROVISION OF AUXILIARY EDUCATIONAL AIDS TO OTHERWISE QUALIFIED DEAF STUDENTS, IRRESPECTIVE OF THE FINANCIAL NEED OF A PARTICULAR STUDENT

Once it is agreed that recipients of federal funds may be required to spend money in order to avoid the illegal exclusion of a handicapped person from a federally funded program or activity, difficult line-drawing questions inevitably arise. This Court suggested as much in *Davis* when it spoke of attaining the goal of enhanced educational and rehabilitation opportunities for the handicapped "without imposing undue financial and adminis-

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may require employers to validate testing procedures by showing that they are a reasonable measure of job performance; such validation would undoubtedly entail some special expense).

trative burdens upon a State" (442 U.S. at 412). The Secretary of HEW, in issuing his Section 504 regulations in April 1977,[10] explicitly recognized the need to consider potential costs in determining which measures must be undertaken by recipients of federal funds in order to comply with Section 504. The Secretary stated (42 Fed. Reg. 22676 (1977) (emphasis added)):

> From the outset, the Department has recognized that the problem of ending discrimination on the

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[10] Petitioners do not challenge the Secretary's authority to issue regulations governing the application of Section 504. Particularly after the adoption of the 1978 amendments to the Rehabilitation Act, such a challenge would be doomed to failure. The amendments added Section 505(a)(2) to the Act, 29 U.S.C. (Supp. II) 794(a)(2), and that provision makes the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" available for the enforcement of Section 504. Section 602 of the Civil Rights Act authorized and directed federal agencies extending federal financial assistance to effectuate the antidiscrimination provisions in Section 601 of the Act "by issuing rules, regulations, or orders of general applicability * * *." 42 U.S.C. 2000d-1. Even before the 1978 amendments made this legislative command expressly applicable to the enforcement of Section 504, Congress had made known its intention that the Secretary of HEW should issue regulations implementing Section 504. See S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (reprinted in brief for the United States as amicus curiae in *Davis*, at 36-37).

The Court in *Davis* did not quarrel with the Secretary's authority to promulgate regulations under Section 504. The Court stated, however, that, "[f]or the first three years after the section was enacted, HEW maintained the position that Congress had not intended any regulations to be issued" (442 U.S. at 412 n.11). The Court further stated that the agency "altered its stand only after having been enjoined to do so" (*ibid.*). The latter statement referred to the district court's ruling in *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976). We know of no basis for the Court's remarks concerning HEW's perception of its obligations under Section 504. It is our understanding that issuance of the Section 504 regulations was delayed, not because HEW did not believe such regulations should be issued, but because development of the regulations was a difficult and time-consuming process. See 39 Fed. Reg. 18582 (1974); 41 Fed. Reg. 20296 (1976); and 41 Fed. Reg. 29548 (1976), all pre-dating the decision in *Cherry*.

> basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.
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> These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that *factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination* and to bring handicapped persons into full participation in federally financed programs and activities.

The regulations promulgated by HEW thus reflect a conscious effort to guarantee handicapped persons an equal opportunity to participate in federally assisted programs but at the same time to avoid the imposition of extremely expensive or impractical burdens on recipients of federal funds.[11] The particular regulation most rele-

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[11] The pursuit of this dual objective is apparent in numerous portions of the HEW regulations. For example, the regulations do not require an employer to accommodate an otherwise qualified handicapped person who applies for employment, if the accommodation involved "would impose an undue hardship on the operation of" the employer's federally funded program. 45 C.F.R. 84.12(a). See also 45 C.F.R. 84.12(c); 45 C.F.R. Part 84, Appendix A, at 383 (describing factors to be considered in making "undue hardship" determination). Similarly, a recipient of federal financial assistance need not "make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons." 45 C.F.R. 84.22(a). The recipient is required only to operate its program in such a way that, "when viewed in its entirety, [the program] is readily accessible to handicapped persons." *Ibid.* This regulation was intended to provide sufficient flexibility "to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facili-

vant to the present case is 45 C.F.R. 84.44(d). It concerns the provision of so-called auxiliary aids in federally funded postsecondary education programs.[12] The regulation states (45 C.F.R. 84.44(d)(1)):

> A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity

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ties." 45 C.F.R. Part 84, Appendix A, at 386. Small social service providers are specifically exempted from the accessibility requirement if compliance would require a significant alteration in existing facilities. 45 C.F.R. 84.22(c). Likewise, small social service providers are not required to provide auxiliary aids for qualified handicapped persons who seek to benefit from the providers' services, unless the provision of such aids "would not significantly impair the ability of the recipient to provide its benefits or services." 45 C.F.R. 84.52(d)(2).

[12] "Auxiliary aids" may include "taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions." 45 C.F.R. 84.44(d)(2).

The regulation explicitly states that "attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature" are not included among "auxiliary aids," as that term is used in 45 C.F.R. 84.44(d)(2). As HEW's *Guide to the Section 504 Self-Evaluation for Colleges and Universities* 41 (1978) explains:

> [T]he statement that institutions need not provide readers for personal use or study, or other devices or services of a personal nature, raises the distinction between "rehabilitation" and "traditional educational" services. * * * Section 504 is intended to open up traditional education to handicapped persons; it does not deal with the rehabilitation of the individual or with personal needs that are apart from the educational process. In this section on auxiliary aids, and throughout other parts of section 504 * * *, it may be easier to envision what is required of the institution if section 504 is viewed as a civil rights statute ensuring rights to equal educational opportunity, rather than a set of requirements addressing rehabilitative or personal needs of handicapped individuals.

> operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

See also 45 C.F.R. 84.4(b)(1)(iii) and (b)(2). As a condition of receiving federal financial assistance, the University of Texas expressly agreed to comply with "all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto" (A. 20).

Although petitioners argued to the contrary in the district court, they apparently now concede that the regulation does not permit recipients of federal funds to use "financial need" criteria in evaluating requests for auxiliary aids filed by otherwise qualified handicapped students. HEW has consistently interpreted its regulations in this way and, in fact, applied that interpretation in this very case, in investigating and attempting to resolve respondent's administrative complaint. In letters to the University of Texas and respondent reporting the results of the agency's investigation, HEW concluded that the University's reliance on a "financial need" standard as a basis for denying respondent's request for assistance violated Section 504 and 45 C.F.R. 84.44(d) (App., *infra*, 9a-16a). The agency stated (*id.* at 15a):

> [U]se of a financial needs criteria in determining whether the necessary aids will be provided to a sensory impaired handicapped student is in violation of [45 C.F.R. 84.44(d)(1)]. The financial status of a qualified handicapped student is not an acceptable criteria [*sic*] for determining whether necessary auxiliary aids will be provided.

Nothing in the comments appended to the regulation at the time of its issuance or in HEW's application of the regulation since April 1977 suggests that the phrase "take such steps as are necessary to ensure" was intended to authorize recipients of federal funds to refuse to provide auxiliary aids to otherwise qualified handicapped students, whenever those students do not satisfy the recipients' financial aid criteria. Rather, as the

agency explained in April 1977 in response to comments from colleges and universities expressing concern about the cost of compliance with the regulation, the requirement that recipients of federal funds ensure the provision of auxiliary aids can usually be met "by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations." 45 C.F.R. Part 84, Appendix A, at 392. Neither when the regulations were issued nor subsequently has HEW suggested in any way that handicapped students' own financial reserves are among the resources on which colleges and universities may draw in satisfying the auxiliary aid requirement. The administrative construction of the agency's own regulation is not "plainly erroneous" or "demonstrably irrational," and it is therefore entitled to conclusive weight. See, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League*, 423 U.S. 12, 14-15 (1975); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 276 (1969); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945).

The remaining question, then, is whether 45 C.F.R. 84.44(d) goes beyond the authority of Section 504 in requiring recipients of federal funds for postsecondary education programs to ensure the provision of auxiliary aids for otherwise qualified handicapped students, irrespective of "financial need" considerations. This Court has held that the validity of a regulation promulgated under a general statutory authorization (see note 10, *supra*) "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority of Durham*, *supra*, 393 U.S. at 280-281. See also *Lau* v. *Nichols*, *supra*, 414 U.S. at 571 (Stewart, J., concurring in the result); *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953). Moreover, the Court has

frequently recognized that the formal regulations and consistent administrative construction of an agency charged with the responsibility for implementing a statute are "entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1 (1965). We submit that 45 C.F.R. 84.44(d) satisfies the standard of review established by this Court and should be upheld.

We emphasize first that the regulation, like all the regulations promulgated under Section 504 and the statute itself, applies only to "otherwise qualified" handicapped persons. Here, the parties stipulated that respondent is a qualified handicapped person within the meaning of Section 504 (A. 30). And, of course, respondent's qualifications for the master's degree program in which he was enrolled at the University of Texas have been amply demonstrated by his successful completion of that course of study. The present controversy is thus unlike the dispute in *Davis*, where the Court found that the handicapped person seeking admission to a college nursing program was not "otherwise qualified" to participate in that program.

As the discussion at the beginning of this portion of the brief implies (see pages 20-22, *supra*), we acknowledge that the costs imposed by a given regulation are a factor that may legitimately be considered by a reviewing court in determining whether the regulation is reasonably related to the purposes of Section 504. Unfortunately, the record in the present case contains woefully little information concerning the financial burden attributable to 45 C.F.R. 84.44(d). This deficiency exists in part because petitioners chose not to contest the validity of the regulation in the district court and in part because the case comes to this Court in the procedural posture of an appeal from the grant of preliminary injunctive relief. We think, however, that the available data do tend to support the proposition that, particularly as applied to the provision of sign-language interpreters for deaf stu-

dents, 45 C.F.R. 84.44(d) is a reasonable measure designed to advance the purposes of Section 504.

In the first place, the contemporaneous comments of HEW, as well as later guidance from the agency to colleges and universities, show that HEW specifically considered the expense factor before deciding to adopt 45 C.F.R. 84.44(d). Because the agency anticipated that auxiliary educational aids could, in most instances, be obtained by handicapped students from sources other than their schools, and because colleges and universities were granted a large measure of discretion in determining what aids to provide and how to provide them, HEW concluded that the regulation would not impose an extremely expensive or impractical burden on recipients of federal funds. As mentioned previously (see page 24, *supra*), HEW advised postsecondary schools that their obligations under the regulation usually could be met through the use of "existing resources * * * such as state vocational rehabilitation agencies and private charitable organizations." 45 C.F.R. Part 84, Appendix A, at 392. The agency elaborated (*ibid.*):

> [T]he Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.
>
> As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times.

HEW substantially repeated these comments in its *Guide to the Section 504 Self-Evaluation for Colleges and Universities* 40 (1978).[13] In fact, in fiscal year 1978, the federal government awarded more than 760 million dollars to state vocational rehabilitation agencies for services for the handicapped, including sign-language interpreters. See HEW's *Annual Report to the President and the Congress on Federal Activities Related to the Administration of the Rehabilitation Act of 1973* 151 (1978). Texas alone received more than 47 million dollars in federal grants for these purposes. *Id.* at 152.[14]

Several other federal programs also offer assistance that may be used to furnish students with auxiliary aids,

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[13] The guidebook stated that, in adopting 45 C.F.R. 84.44(d), HEW

> intended for colleges and universities to meet their obligations by assisting students in the use of already existing resources for auxiliary aids, such as State Vocational Rehabilitation agencies and private charitable organizations. Through a liaison with such agencies and organizations, the institution should be able to, in most instances, make auxiliary aids available to its students at no expense to the institution.

[14] Respondent's application for vocational rehabilitation services was denied on the ground that he did not have a substantial employment handicap (A. 12). The validity of that determination is not at issue here.

The American Council on Education asserts in its brief as amicus curiae (Br. 13) that, in actual practice, state vocational rehabilitation agencies have denied auxiliary aids to postsecondary students in reliance on the "similar benefits" provision of the Rehabilitation Act of 1973, which requires vocational rehabilitation agencies to provide services only "after full consideration of eligibility for similar benefits under any other program." 29 U.S.C. 721 (a)(8). However, in 1977, HEW's Rehabilitation Services Administration issued an interim policy statement advising vocational rehabilitation agencies that the "similar benefits" provision, by itself, should not preclude the provision of auxiliary aids to postsecondary students who are otherwise eligible for assistance. And, more recently, in *Jones v. Jeffers*, Civ. No. 79 C 5396 (N.D. Ill. Jan. 12, 1981), the district court held (slip op. 13-16) that the "similar benefits" provision is not a permissible basis for denying assistance to all students attending postsecondary institutions, because uni-

including sign-language interpreters. The Department of Education's Office of Handicapped Concerns recently listed seven such programs in a publication designed to assist educational institutions in locating sources for educational aids. *Auxiliary Aids: A Resource Guide for Postsecondary Schools, Rehabilitation Agencies, and Handicapped Individuals* (1980).[15] In addition, of course, recipients of federal funds may seek assistance from private charitable organizations or from students willing to volunteer their time. And, in some circumstances, measures entailing little, if any, cost may insure effective instruction. For example, not every student with a hearing impairment needs a sign-language interpreter for effective instruction, and even those who generally need an interpreter may not need one for every course. Accordingly, we agree with the American Council on Education (Br. 27) that in some circumstances, provision of notetakers, access to instructor's lecture notes, or special tutoring may be adequate to insure effective instruction for hearing-impaired students.[16]

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versities do not operate rehabilitation programs, and only programs of this kind are covered by the phrase "similar benefits" as used in the Rehabilitation Act. The Department of Education believes that the decision in *Jones* reflects the correct interpretation of the Rehabilitation Act of 1973. If there should be any change in the Department's policy in this regard, we will, of course, promptly inform the Court.

[15] These programs are (1) the Special Services for Disadvantaged Students Program, 20 U.S.C. 1070d-1(b)(3); (2) the Regional Postsecondary Education Programs for Deaf and other Handicapped Persons, 20 U.S.C. 1424a; (3) the Cooperative Education Programs, 20 U.S.C. 1133 *et seq.*; (4) the College Work-Study Program, 42 U.S.C. 2751 *et seq.*; (5) the Community Service and Continuing Education Program—Special Projects, 20 U.S.C. 1005a; (6) the Fund for Improvement of Postsecondary Education, 20 U.S.C. 1221d; and (7) the Educational Opportunity Centers, 20 U.S.C. 1070d-1(b)(4).

[16] Contrary to the American Council on Education's contention, however, the lower courts in the present case did not err in failing to determine whether such alternatives would insure effective in-

The average annual expense that would actually be incurred by a college or university in providing a sign-language interpreter for a deaf student is not established by the record. We know, however, that respondent paid $1,245 for an interpreter to assist him in nine courses (A. 32). Unless the University of Texas follows a schedule significantly different from most postsecondary institutions, we can reasonably assume that nine courses represent nearly a full year's work for a fulltime student. The American Council on Education, on the other hand, cites (Br. 28 & n.18) a California State University study that allegedly shows that the annual cost of interpreter services for a fulltime deaf student is approximately $4,000. But, even if this higher figure is accurate, the amount still pales by comparison to the total amount of federal financial assistance given to postsecondary educational institutions.

A critical consideration in assessing the relationship between the Secretary's regulations and the purposes of Section 504 is that all the regulatory requirements, including in particular the auxiliary aid requirements in 45 C.F.R. 84.44(d), have been imposed only as a condition of the receipt of federal funds. The burden that can effectively be imposed by such regulations is limited by the amount of federal aid to which the regulations are tied. To the extent, therefore, that petitioners mean to attack the Secretary's regulations as unduly expensive, their argument disregards the fact that the University of Texas, like other colleges and universities, is free to decline federal aid if the benefits to be derived from that aid do not outweigh the costs associated with it. When a university receives $31,000,000 in federal assistance, as the University of Texas did in 1978 (A. 32), it is

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struction for respondent. The parties stipulated that respondent needed a sign-language interpreter for effective instruction (A. 31). Moreover, the district court's order expressly gave petitioners the option of providing a sign-language interpreter or "other effective method of making orally delivered course materials available to [respondent]" (Pet. App. A-22).

difficult to understand how the school can argue, on financial grounds, that the requirement of ensuring the provision of a sign-language interpreter for a qualified deaf student is not reasonably related to the purposes of Section 504.[17]

This Court need not now decide whether it would also have been consistent with the purposes of Section 504 for the Secretary to promulgate a regulation stating that recipients of federal funds need not provide auxiliary educational aids to qualified handicapped students if those students fail to satisfy reasonable financial need criteria. That question is not before the Court. Whether or not such a regulation would have been a reasonable policy choice, the Secretary elected not to follow that path. There were several reasons for this decision. First, it would have meant that some handicapped students wishing to participate in federally funded programs would have been forced to bear a special financial burden solely on the basis of their handicap. Second, it would have required the Secretary to monitor the financial need criteria employed by all recipients of federal funds to make certain that they were reasonable and were not being used unfairly to exclude qualified handicapped students. This arguably would have involved a more serious intrusion into the affairs of colleges and universities than is contemplated by 45 C.F.R. 84.44(d). Third, by permitting different schools' financial aid criteria to determine the availability of auxiliary educational aids for certain handicapped students, the Secretary would have created a lack of uniformity in the administration of Section 504 that could easily have resulted in restricting the educational choices effectively available to handicapped students. Solely because of a student's handicap, he or she

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[17] The record does not disclose whether the University of Texas received federal assistance that could have been used directly to provide a sign-language interpreter for respondent. The record also does not reveal whether petitioners explored the possibility of obtaining aid for respondent from private organizations or student volunteers.

might have been influenced to attend a particular school where auxiliary aids would be provided or to pursue a particular course of study in which the university's refusal to provide auxiliary aids would not have such serious financial consequences.

To avoid these problems, and for reasons of administrative convenience, the Secretary rejected the possibility of incorporating a financial need test in his regulations and instead adopted the approach reflected in 45 C.F.R. 84.44(d). The provisions of that regulation are reasonably related to the fundamental purpose of Section 504, *i.e.*, preventing the exclusion of qualified handicapped persons from federally funded programs. At least in the absence of some greater showing that the regulation imposes excessive burdens on the recipients of federal funds, there is no justification for refusing to enforce the regulation in this case. The court of appeals therefore correctly affirmed the district court's award of preliminary injunctive relief.[18]

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[18] In their briefs as amici curiae, the American Council on Education (Br. 28-29) and the Equal Employment Advisory Council (Br. 27-28) cite *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 72 (1977), for the proposition that any accommodation of handicapped students involving more than minimal costs would impose an undue hardship. The issue in *Hardison* was the extent to which employers are required, under Title VII of the Civil Rights Act of 1964, to accommodate the religious preferences of employees. *Hardison* is an inapposite precedent because, unlike Title VII, Section 504 applies only to recipients of federal funds, and it requires accommodations based on handicap rather than religion. Under its delegated power to spend for the general welfare, Congress may reasonably require voluntary recipients of federal tax dollars to spend money to comply with federal laws that protect the handicapped. The religious accommodations at issue in *Hardison* could not have been justified under this "spending power" rationale. Moreover, the accommodations required by the court of appeals in *Hardison* were made necessary by the employee's voluntary religious choice; they would have impinged on his fellow employees and on a valid seniority system. 432 U.S. at 80-83. Respondent and other handicapped persons do not ordinarily choose to be disabled, and the provision of auxiliary educational aids in the University of Texas' master's degree program would not implicate the Establishment Clause or impinge directly on any other student.

CONCLUSION

The judgment of the court of appeals should be affirmed.[19]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING L. GORNSTEIN
Attorneys

FEBRUARY 1981

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[19] Petitioners also ask this Court to decide whether Section 504 creates a private right of action. The Court need not reach that question, however, because respondent's suit was properly brought under 42 U.S.C. 1983. *Maine* v. *Thiboutot*, No. 79-838 (June 25, 1980). Should the Court nevertheless address petitioners' second question, it should hold that Section 504 does authorize enforcement through private litigation. The reasons for this conclusion are stated in the brief for the United States as amicus curiae in *Davis* (Br. 68-76) and in the briefs for the federal respondents in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) (Br. 35-40; Reply Br. 14-15). (We are providing the parties with copies of the government's briefs in *Cannon* as well as the brief in *Davis*.) This Court's decision in *Cannon* provides strong—indeed, we believe, dispositive—support for the view that Section 504 does impliedly create a private right of action.

Petitioners further ask the Court (Br. 16-18) to consider whether the "program or activity" in which respondent participated received federal financial assistance and therefore was subject to the antidiscrimination provisions in Section 504. This question was not raised in the courts below and is not properly before the Court. Because this case is here at the preliminary injunction stage, the "program or activity" question can be fully explored during further proceedings in the district court.

APPENDIX

[SEAL]

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
Austin, Texas 78712

President

January 15, 1979

Mr. Miles Schulze, Director
Post-Secondary Education Division
Office of Civil Rights
Department of Health, Education and Welfare
1200 Main Tower Biulding
Dallas, Texas 75202

Dear Mr. Schulze:

I am writing to acknowledge your letter of December 20, 1978, regarding the complaint filed by Mr. Walter Camenisch (Camenisch vs. University of Texas, #065370041) alleging discrimination on the basis of handicap under jurisdiction of Section 504 of the Rehabilitation Act of 1973. Your letter was received in my office on January 4, 1979. In accordance with the January 5, 1979 telephone communication between our offices, please accept the following as a timely response to your request for data and information relevant to this complaint.

With regard to your early complaint resolution procedure, the issues involved in this complaint have been thoroughly explored by the University and Mr. Camenisch through our internal procedures and, as witnessed by the fact that Mr. Camenisch has filed a civil suit in the U.S. District Court for the Western District of Texas, we have not been able to arrive at a mutually agreeable solution. Unless you have new information to the contrary, we do not believe a voluntary resolution of the issues by the parties is feasible.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, states:

> No otherwise qualified individual in the United States as defined in Section 7(6) shall solely be reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The regulations promulgated pursuant to Section 504 under Section (d), Auxiliary Aids, of Section 88.44, Academic Adjustments, state:

> (1) A recipient . . . shall take *such steps as are necessary to insure* that no handicapped student is . . . subjected to discrimination under any educational program . . . because of the absence of educational auxiliary aids . . . (emphasis added).

Thus, both the statute and the regulations charge institutions of higher education to take appropriate steps to insure that all of their educational programs are accessible to qualified handicapped students.

Auxiliary aids as defined in the regulations (§ 88.44 (d) (2)), fall into two distinct categories. First, *durable* auxiliary aids are those which, once provided, allow multiple use by successive classes of students. Such durable auxiliary aids include, among others, building modifications, ramps, taped texts and braille computer terminals. The second category, *consumable* auxiliary aids, represent those expendable single-use services which are provided by an individual to a student on a one-on-one basis and, once provided, cannot be reused. Examples in this category include wheelchair attendants, deaf interpreters and individual readers.

With regard to the complaint filed by Mr. Camenisch it is acknowledged that he is a deaf student at The University of Texas at Austin and that he has a need for the services of a qualified interpreter. It is further acknowledged, both in your letter and by Mr. Camenisch, that he has provided for such interpreter services from his personal funds during his graduate studies at the

University. Thus, at the outset, it is established that Mr. Camenisch has not been excluded from participation in, denied the benefits of or subjected to discrimination under any of the educational programs in our graduate school.

When an individual such as Mr. Camenisch requests the University to provide auxiliary aids of the *consumable* type described above, it is the position of the University that our responsibilities and obligations under Section 504 (and the regulations issued pursuant to it) require the University "to take such steps as are necessary *to insure*" that no handicapped student is denied any educational benefit as a result of a lack of educational auxiliary aids. The specific steps we take to make this determination involve having our Financial Aid Office conduct a financial needs assessment employing the same criteria mandated for most Federal student aid. Once a budget has been established using these criteria, the full cost related to the educational auxiliary aid service is added to arrive at a final budget. Employing these criteria at the time of his request, Mr. Camenisch's academic year need-based budget is $6,900 which includes an add-on supplement of $1,350 for the services of a qualified deaf interpreter (this supplement was calculated using rates of pay and estimated hours of service needed as supplied by Mr. Camenisch.) The actual annual income of Mr. Camenisch and his spouse was greater than $23,000, a sum which is substantially in exess of the financial resources required to insure full access to our educational programs. By means of this analysis we have taken all appropriate and necessary steps to insure that Mr. Camenisch is not being denied any educational opportunity due to the absence of an educational auxiliary aid. Thus, with respect to Mr. Camenisch, the University is in full compliance with Section 504 and the accompanying regulations. If an applicant for *consumable* educational auxiliary aids does not have the financial resources equivalent to his/her projected need-based

budget, the University will provide the funds necessary to insure that the student is not deprived of any educational opportunity due to the absence of auxiliary aids. In fact, financial assistance has been committed by the University this semester to assist in paying for a qualified deaf interpreter for another student.

Obviously, this specific complaint raises a much broader question regarding the obligations of institutions of higher education under Section 504 with respect to the provision of consumable educational auxiliary aid services. Stated succinctly, are institutions of higher education required to fund all expenses for all consumable auxiliary aids upon demand; that is, does Section 504 provide an open-ended entitlement to each and every handicapped student requesting auxiliary aids? Or, in the alternative, are institutions of higher education required under Section 504 *to insure* that there is no discrimination due to the absence of auxiliary aids? We understand that there is a draft Policy Interpretation No. 7 for Section 504 that proposes specifically to prohibit institutions of higher education from using a financial means test even when considering the provision of *consumable* educational auxiliary aids. In our opinion such an interpretation would not be consistent with Section 504. The drafting history of both the statute and the regulations is replete with references that higher education can usually meet their obligations to provide auxiliary aids through existing resources of other groups. We are unaware of any qualification that states the alternative provider may not be the recipient, assuming he/she has adequate financial resources. Furthermore, any interpretation that requires the University to provide auxiliary aids without regard to other sources could seriously jeopardize the eligibility of handicapped students to receive aid from State vocational rehabilitation agencies. Once an institution, using legitimate criteria, has established the availability of educational auxiliary aids for a specific individual and thus has insured that

the individual will not be deprived of any educational benefit due to the absence of auxiliary aids, the obligations of an institution of higher education under Section 504 should cease. To require institutions such as UT Austin to divert public funds to provide educational auxiliary aids to individuals who have no financial need represents at best an irresponsible use of public funds, it could well jeopardize other important educational programs that would be of benefit to all students and, perhaps most importantly, it will not further the objectives of Section 504 in any way.

In summary, it is our firm conviction that a reasonable financial means analysis represents a legitimate method to insure the absence of discrimination with regard to consumable educational auxiliary aids, and that any interpretation to the contrary represents an unwarranted extension of Congressional intent with regard to Section 504.

If we can provide you with any additional information, or if you would like to discuss any of the issues raised by this letter, please do not hesitate to contact my office. We stand ready to assist you in any way we can.

Sincerely yours,

/s/ Lorene L. Rogers
LORENE L. ROGERS
President

LLR/cs

[SEAL]

THE ATTORNEY GENERAL OF TAXES

January 21, 1980

Honorable Gilbert F. Ganucheau
Clerk
United States Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 78-2191; Walter Camenisch v.
The University of Texas, et al.

Dear Mr. Ganucheau:

The notice of scheduling of cases which I received on the *Downing* case included the above styled case among those to be argued at the same week. While I have not received a specific notice on that case; therefore, it appeared advisable to inform the Court of intervening cases on the *Camenisch* issues, and they are set forth below.

1. *Southeastern Community College* v. *Davis*, —— U.S. ——, 99 S.Ct. 2361 (1979). This case is the first case decided by the United States Supreme Court interpreting Section 504 of the Rehabilitation Act of 1973. The Supreme Court held in *Davis* that universities were not compelled by the Rehabilitation Act of 1973 to undertake affirmative action in modifying post-secondary educational programs to accommodate handicapped persons. In so holding, the court ruled that Section 504 did not compel the University to provide individual supervision for *Davis* and further ruled that an interpretation of the regulations requiring extensive modifications would raise grave doubts about the validity of such regulations. Defendants contend that there is very little difference between requiring the University of Texas to provide an individual interpreter for *Mr. Camenisch* and the require-

ment for providing *Davis* individual supervision. The latter requirement was, of course, struck down by the Supreme Court. Defendants contend that they have taken all other necessary steps to accommodate *Mr. Camenisch's* handicap.

2. *Cannon* v. *University of Chicago, et al.*, —— U.S. ——, 99 F.Ct. 1946 (1979). This case concerned the jurisdictional question of a private cause of action under Title IX. Defendants contend that it does not apply to private causes of action under Section 504, but bring it to the Court's attention because it did concern the implications of a private cause of action arising under Title VI. Defendants contend that the instant case and *Cannon* can easily be distinguished. In the instant case the very question before the Court involves an interpretation of H.E.W. regulations. In *Camenisch* that agency was never given an opportunity to rule on the regulations before court action was sought. While Defendants contended that there is no private cause of action under Section 504 and would reiterate that the Supreme Court specifically failed to rule on this question in *Davis*, Defendants have alternatively contended that if there is such a private cause of action at the very least exhaustion of the agency's administrative requirements is required. Appellees, therefore, do not believe that *Cannon* is authority for the proposition that there is a private cause of action available in this case.

Defendants, who are Appellees in this cause of action, feel they have a duty to advise the Court that *Mr. Camenisch* has completed the degree program in which he was enrolled at the time of the issuance of the injunction complained of herein, and has not sought reenrollment at the University of Texas.

Your courtesy in allowing the parties to bring intervening cases to the Court's attention is greatly appreciated.

Sincerely,

Martha H. Allan
Assistant Attorney General

MHA:jm

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Ref: #780041
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Dr. Peter T. Flawn
President, University of Texas at Austin
Office of the President
Austin, Texas 78712

Subject: *Camenisch* v. *University of Texas at Austin*

Dear Mr. Flawn:

This is to advise you that we have completed our investigation of the individual and class-type complaints filed by the National Association of the Deaf Legal Defense Fund under the jurisdiction of Section 504 of the Rehabilitation Act of 1973, on behalf of Mr. Walter Camenisch and other deaf graduate students at the University of Texas at Austin (UTA).

The issue raised in this complaint is that Mr. Camenisch, as well as other deaf graduate students, is subjected to discrimination under the educational program operated by UTA because of the absence of educational auxiliary aids for graduate students with impaired sensory or speaking skills.

Mr. Camenisch filed a civil suit in the U.S. District Court for the Western District of Texas on March 8, 1978. A Preliminary Injunction was issued and the Court ordered that the action be stayed, pending a final HEW administrative determination. Mr. Camenisch was required by the Court to initiate a complaint with our office.

An on-site investigation was conducted by Dr. Marta Olchyk, March 19-21, 1979. Based on the results of that investigation, we have concluded that the University is in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with impaired sensory skills, thus denying handicaped students equal educational opportunities.

We have also determined that UTA is in violation of Section 504 of the Rehabilitation Act of 1973 by:

(a) Failure to include handicapped students or their representative organizations in the meetings held by the Committee for the Handicapped.

(b) Failure to maintain adequate records of the meetings held by the Committeed for the Handicapped.

(c) Failure to make accessible data pertinent to this complaint to the investigator during the on-site investigation.

45 C.F.R. 84.44(d) provides:

> "Auxiliary aids: (1) A recipient to which this subpart applies shall take such steps as necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under any educational program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills."

Our investigation revealed that Mr. Camenisch is a qualified handicapped individual as defined by the implementing regulation of Section 504 of the Rehabilitation Act of 1973. Mr. Camenisch, as well as other deaf graduate students, requested that UTA provide funds for the payment of a qualified interpreter for the purpose of assuring them full participation in classes at that institution. We have determined that the requested interpreter services were necessary for Mr. Camenisch to fully participate in the educational program in which he was enrolled. Mr. Camenisch was denied such services verbally and in writing by the UTA administrators. The basis cited for the denial was the University's financial needs criteria. 45 C.F.R. Section 84.6(c)(1) provides that:

> "A recipient shall, within one year of the effective date of this part (i) evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and the effects thereof that do not or may not meet the requirements of this Part: (ii) modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and (iii) take, after consultation with handicapped persons appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices."

Our investigation revealed that the Committee for the Handicapped neither included, nor sought assistance from handicapped persons or organizations representing students with impaired sensory, manual or speaking skills, even though Mr. Camenisch, as well as others took their concerns regarding free interpreter services, to several officials at UTA. This is found in violation of the above quoted paragraph of Section 504 of the Rehabilitation Act of 1973.

Section 84.6(c)(2) requires:

> "A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(i) of this section maintain on file, make available for public inspection, and provide to the Director upon request: (ii) a description of areas examined and (iii) a description of any modifications made and of any remedial steps taken."

Our investigation revealed that the Committee for the Handicapped chaired by Dr. Donald Brown, which has met formally on several occasions, was unable to provide us with any written record regarding agenda or topics discussed, specific issues or recommendations as a result of these meetings.

This is found in violation of the above quoted paragraph of Section 504 of the Rehabilitation Act of 1973.
Because of the cited violations found to exist at UTA, the Office for Civil Rights is requesting you to develop and submit to our office a specific plan within 15 working days of the date of this letter which will correct these violations.

At a minimum, the plan must include the following:

—Reimbursement to Mr. Walter Camenisch for expenses incurred in order to acquire interpreter services during the duration of his class work at the University of Texas at Austin. The amount claimed in court by the complainant on May 19, 1979, totaled $1,245.00. If any further expenses were incurred by Mr. Camenisch after this date in the provision of interpreter services, it should be reimbursed as well.

—Specific guidelines for the maintenance of adequate records of meetings, recommendations, and remedial steps to be taken by the Committee for the Handicapped individuals.

—Appropriate and continuing steps to notify all students and applicants of the University's obligations under Section 504 to provide auxiliary aids to graduate students with impaired sensory skills.

—Enlistment, in the Committee for the Handicapped, of handicapped persons with impaired sensory, manual or speaking skills, or organizations representing such persons. A list of the members of this new Committee should be included in the plan to be forwarded to our office.

Please be assured that we will give you all the cooperation needed to help solve the issues voluntarily. Nevertheless, our Regulations stipulate that failure to correct the violations found may lead to enforcement proceedings with a risk of losing Federal funding.

Questions related to this matter should be addressed to our Postsecondary Education Division at (214) 767-3985.

Sincerely,

/s/ Taylor D. August
TAYLOR D. AUGUST
Director, Region VI

bcc:

D/HEW/Wash-Reading
PED-Reading
Official/PRMS
PHughes-Exec. Secretariat -OCR-HQ
OCR/PED/EOS-Olchyk/tg:1/23/80

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGIONAL OFFICE
1200 Main Tower Building
Dallas, Texas 75202

January 24, 1980

Office For Civil Rights
Ref: # 780041
#792062

Mr. Marc P. Charmatz
Litigation Attorney
The National Association of the Deaf
Legal Defense Fund
P.O. Box 1793
7th Street & Florida Avenue, N.E.
Washington, D.C. 20002

Subject: *Camenisch* vs. *University of Texas at Austin*

Dear Mr. Charmatz:

The investigation of the allegations against the University of Texas at Austin (UTA) raised by Mr. Walter Camenisch has been completed. Our findings are directed to you since Mr. Camenisch has designated you as his legal representative.

An on-site investigation was conducted by Dr. Marta Olchyk on March 19-21, 1979. Based on the results of that investigation, we have concluded that UTA is in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with impaired sensory skills, thus denying handicapped students equal educational opportunities.

Our investigation revealed that Mr. Camenisch is a qualified handicapped individual as defined by the implement-

ing regulation of Section 504 of the Rehabilitation Act of 1973. Mr. Camenisch, as well as other deaf graduate students, requested that UTA provide funds for the payment of a qualified interpreter for the purpose of assuring them full participation in classes at that institution. We have determined that the requested interpreter services were necessary for Mr. Camenisch to fully participate in the educational program in which he was enrolled. Mr. Camenisch was denied such services verbally and in writing by the UTA administrators. The basis cited for the denial was the University's financial needs criteria.

45 CFR, Section 84.44(d) of the Regulations implementing Section 504 of the Rehabilitation Act of 1973 provides:

> Auxiliary Aids: (1) A recipient to which this subpart applies shall take such steps as necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under any educational pogram or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

Therefore, use of a financial needs criteria in determining whether the necessary aids will be provided to a sensory impaired handicapped student is in violation of the above quoted paragraph. The financial status of a qualified handicapped student is not an acceptable criteria for determining whether necessary auxiliary aids will be provided.

Based on the above, our office requested that UTA develop and submit to us a specific plan which will correct this violation within 15 working days of the date of this letter.

A copy of the letter of findings sent to UTA will be made available to you upon request.

We would like to thank you and Mr. Camenisch for the cooperation provided to us while conducting this investigation. You will be informed of the status of the case.

Sincerely,

/s/ Taylor D. August
TAYLOR D. AUGUST
Director, Region VI

cc. Walter Camenisch

Dated 11/19/80

Mr. Robert Giddings, Esq.
Office of General Counsel
The University of Texas System
201 West 7th Street
Austin, TX 78701

RE: *Camenisch* v. *The University of Texas at Austin*, OCR Docket Nos. 06780041 and 06792062

Dear Mr. Giddings:

I am writing pursuant to our telephone conversation of November 9, 1980 concerning administrative enforcement of the above-captioned complaints. As you know, those complaints were filed on behalf of, respectively, Mr. Walter Camenisch, at the time a deaf graduate student at the University of Texas at Austin, and a class of deaf or hearing impaired students at the University. The complaints were filed subsequent to a Federal district court order enjoining the University to provide interpreter services for Mr. Camenisch under Section 504 of the Rehabilitation Act of 1973.

The district court's injunction was upheld by the U.S. Court of Appeals for the Fifth Circuit. Recently, however, the U.S. Supreme Court granted the University's petition for a writ of *certiorari;* a decision by the Court on the merits is expected this term. It is my understanding that the Supreme Court will review all questions presented by the University on appeal, including the obligation of postsecondary institutions to provide interpreter services to deaf students under Section 504. Because of the scope of this review, the Office for Civil Rights will defer administrative action on the above complaint pending the outcome of the appeal.

Sincerely,

Antonio J. Califa
Deputy Assistant Secretary
Office of Litigation,
Enforcement and Policy

cc: Cynthia G. Brown
Taylor August
Joan Sessoms

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